

Telephone, and WorldCom that BellSouth ignored the change control process and unilaterally developed a set of alternative plans for an industry standard release in 2003.<sup>390</sup> Despite WorldCom's and AT&T's assertions that BellSouth has reorganized release schedules **so** that they deviated from the competitors' prioritized **changes**,<sup>391</sup> the record shows that BellSouth presented its competitors with two options for the 2003 release schedule, received a counterproposal from the competitive LECs, and is now implementing that counterproposal.<sup>392</sup> Although it appears that BellSouth could have communicated better with the competitive LEC community during this process, we find no evidence that BellSouth failed to adhere to its change control plan. As BellSouth's actions conform to the requirements of its change control process, we find it to be compliant with checklist item 2.

**119.** Relatedly, WorldCom and AT&T argue that BellSouth is not providing timely information about why prioritized changes are not implemented in prioritized order.” The Department of Justice also commented that BellSouth needs to discuss its releases openly with competitive LECs when it believes capacity constraints will prevent it from following the competitive LECs' prioritized list.” We have similar concerns, and find that BellSouth may have valid, operational reasons to depart from the competitive LECs' prioritization of change requests, but it must discuss with the competitive LECs its reasons for, and provide timely information about, its departure from the prioritized list.<sup>393</sup> Moreover, we believe that BellSouth should provide information not just when change requests are prioritized, but during all steps of the process. In response to these concerns, BellSouth has provided the Commission with detailed information in this proceeding explaining how capacity constraints determined when the competitive LECs' prioritized changes would be implemented in the upcoming 2003 releases.<sup>394</sup> The record also shows that since April 2002, BellSouth **has** met with its competitors on over 60 separate occasions to discuss change management issues. Although we encourage BellSouth to continue its efforts to share relevant information with competitors in **a** timely fashion throughout the change management process, we find no evidence that BellSouth has failed to adhere to the change control plan or with the requirements of checklist item 2. In addition, we **are** persuaded that BellSouth will continue to make significant efforts to improve its communications with competitive LECs, and in the future, will take the necessary step of providing timely, pertinent information that relates to the change control process.

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<sup>390</sup> AT&T Comments at 11; AT&T Bradbury Decl. at paras. 26-27; AT&T Reply at 8; AT&T Bradbury Reply Decl. at paras. 6-7; WorldCom Comments at 2-3; Network Telephone Comments at 9.

<sup>391</sup> WorldCom Comments at 2-4; AT&T Comments at 11; AT&T Bradbury Decl. at 26-27.

<sup>392</sup> BellSouth Reply at 11-12; BellSouth Stacy Reply Aff. at paras. 43-49.

<sup>393</sup> WorldCom Comments at 4-5; AT&T Reply at 7-9; AT&T Bradbury Reply Decl. at paras. 6-8; AT&T Nov. 13 *Ex Parte* Letter – OSS at 5-6.

<sup>394</sup> Department of Justice Comments at 7.

<sup>395</sup> *Id*

<sup>396</sup> See BellSouth Stacy Reply Aff. at paras. 72-74, and Ex. WNS-33 .

**120.** We also reject AT&T's and WorldCom's arguments that BellSouth has violated the change control process by failing to inform competitors of "[competitive LEC]-affecting" changes. Commenters generally complain that BellSouth has failed to provide information about upcoming changes to some of its underlying interfaces, which will affect competitors' access to BellSouth's OSS. Specifically, the commenters argue that BellSouth has failed to submit change requests and sizing information regarding the upcoming migration from the Application Program Interface (API) to the Extensible Markup Language (XML) architecture for BellSouth's TAG interface, and the implementation of IDN infrastructure.<sup>397</sup> WorldCom explains that these changes are "[Competitive LEC]-affecting" because they are "unique to the [competitive LEC] wholesale environment," and will impact the way in which BellSouth processes competitive LEC orders, and could cause significant problems, particularly for orders being processed at the time of the change.<sup>398</sup> Evidence in the record shows that these changes in underlying architecture are transparent to competitive LECs, and have no effect on their access to the BellSouth OSS.<sup>399</sup> The record shows, moreover, that representatives from both AT&T and WorldCom were present at meetings where BellSouth proposed its infrastructure initiatives, and neither party **objected**.<sup>400</sup>

**121.** We also reject the claims of WorldCom, AT&T, and Covad that BellSouth will not adhere to the change control process without significant protest by competitive LECs or the close **scrutiny** of state or federal regulators.<sup>401</sup> For example, commenters allege that without competitor protest and regulatory pressure, BellSouth would have neither corrected a KFMG exception,<sup>402</sup> nor implemented competitors' prioritized change requests.<sup>403</sup> Evidence in the record shows, however, that BellSouth **has** taken action without regulatory **involvement**.<sup>404</sup> For example, collaborative meetings beginning in early 2002 resulted in agreements **on** such significant change control issues **as** expanding the definition of "[Competitive LEC]-affecting change," creating the "go/no go" concept, and providing capacity information and size estimates for future and prior releases.<sup>405</sup> Furthermore, the record before us does not indicate that

<sup>397</sup> See AT&T Comments at 12; AT&T Bradbury Decl. at paras. 27, 30-34; WorldCom Comments at 6.

<sup>398</sup> See WorldCom Comments at 6 (quoting BellSouth Stacy Aff.).

<sup>399</sup> See BellSouth Nov. 20 Ex Parte Letter – #1 at 10. The record **shows** that migrating to the TAG XML is a **software** protocol change that will not affect the functionality of TAG **and has** not generated competitor concern in the past. See BellSouth Stacy Reply Aff. at para. 69.

<sup>400</sup> See BellSouth Stacy Reply Aff. at paras. 74-75.

<sup>401</sup> WorldCom Comments at 4; AT&T Comments at 14; AT&T Bradbury Decl. at paras. 8, 19-21; Covad Comments at 17.

<sup>402</sup> Covad Comments at 17.

<sup>403</sup> WorldCom Comments at 3-4; AT&T Comments at 11.

<sup>404</sup> See BellSouth Stacy Reply Aff. at para. 22.

<sup>405</sup> BellSouth Stacy Reply Aff. at paras. 23, 28. In the BellSouth *Multistate* Order, the Commission recognized this collaborative effort, stating, "BellSouth agreed to competitive LECs' requests to expand the definition of '[competitive] LEC-affecting' changes. . . accepting the competitive LECs' proposed definition verbatim, **so** that the (continued,...)"

BellSouth is denying competitors an opportunity to provide meaningful input into the change control process simply because competitors have to occasionally avail themselves of a regulatory process in order to resolve a dispute.<sup>406</sup> As we have previously stated, "BOCs [must] provide competitive LECs 'opportunities for meaningful input' in the change management process, [but they do not have] to relinquish control over their systems or to provide unlimited resources to implement all change requests."\* We find that the record supports a finding that BellSouth is complying with the change control process.'" As we discuss below, we intend to monitor, **through** the enforcement process, BellSouth's ongoing compliance with the change control process. In that regard, we are reassured by the fact that the Florida Commission, among others, has stated its intention to remain involved in the change management process.<sup>409</sup>

122. *Delay of Release 11.0.* We are not persuaded by the assertions of AT&T, WorldCom, and Network Telephone that BellSouth's decision to postpone Release 11.0 indicates persistent flaws in BellSouth's testing process, and is evidence that it does not adhere to its change management process.<sup>410</sup> We find that BellSouth's delay of the release appears to demonstrate BellSouth's commitment to its processes.'" These commenters claim that **as early as** October 4, 2002, BellSouth learned from its vendor of defects in pre-release versions of the software. According to the commenters, BellSouth had an obligation to inform the competitive LECs of these defects at that time, and **should** not have waited four weeks before advising (Continued from previous page) \_\_\_\_\_ CCP will apply to a broader array of possible changes." BellSouth *Multistate Order*, 17 FCC Rcd at 17694, para. 181.

<sup>406</sup> We reject AT&T's characterization of BellSouth's Motion for Reconsideration and Clarification of a Georgia Commission performance measurements proceeding. See Letter filed by Alan C. Geolot, Counsel to AT&T, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 02-307 (filed Dec. 10, 2002). BellSouth is simply asserting its procedural rights in a state regulatory proceeding in which AT&T **has** rights **as well**. Further, the Georgia state proceeding is not decisional to our analysis of the current application. Accordingly, we do not find that AT&T's claims warrant a **finding** of checklist noncompliance.

<sup>407</sup> *BellSouth Multistate Order*, 17 FCC Rcd at 17698-99, para. 185.

<sup>408</sup> Similarly, we find **no** merit to AT&T's assertion that BellSouth has no intention of improving its performance, but rather, is concentrating on avoiding penalties associated with the inadequate implementation of competitive LEC change requests and is coercing competitors to comply with its demands by threatening to reduce capacity. See AT&T Bradbury Decl. at para. 10. BellSouth explains that AT&T misinterpreted its statements, and that it was simply expressing concern that by **spending** more time **on** scheduling and development planning, less time would be left for the planning and programming of the releases. See BellSouth Stacy Reply Aff. at para. 45.

<sup>409</sup> The Florida Commission states that the commission "will continue to monitor the Change Control Process . . . to ensure BellSouth is providing service in a nondiscriminatory manner." Florida Commission Comments – OSS Test at 57.

<sup>410</sup> AT&T Nov. 13 *Ex Parte* Letter – OSS at 3; Network Telephone Nov. 21 *Ex Parte* Letter at 1-2; WorldCom Nov. 20 *Ex Parte* Letter at 1-2.

<sup>411</sup> BellSouth states that it anticipates that Release 11.0 will **go** into production on December 29, 2002. Letter from Glenn T. Reynolds, Vice President – Federal Regulatory, BellSouth, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 02-307 at 1 (filed Dec. 6, 2002) (BellSouth Dec. 6 *Ex Parte* Letter – #5).

competitive LECs of BellSouth's decision to delay 11.0's release.<sup>412</sup> The commenters also allege that when BellSouth finally informed the competitive LECs of its decision to delay the release, it did not include the same information provided to the Commission on October 31<sup>st</sup>. The Commenters argue that it is not consistent with the collaborative process for the competitive LECs to have to cull information from BellSouth's *ex parte* filings with the Commission.

**123.** Although we agree that BellSouth should have provided the competitive LECs with the same information that it provided to the Commission, the evidence in the record shows that BellSouth provided all required information and complied with plan deadlines." According to its change management plan, BellSouth is required to provide competitors with software release information 30 days prior to the scheduled release date or, if the release has an extended CAVE soak period, one week prior to the CAVE start date." Given that Release 11.0's original implementation date was to have been December 8", and that it was scheduled to go into CAVE on November 11<sup>th</sup>, BellSouth's November 4" notice was within the 30-day requirement." Moreover, we agree with BellSouth that it did not have to disclose the communications it received from its vendor in early October. BellSouth explains that unlike previous releases, it received information about its vendor's coding and testing problems with Release 11.0 earlier in the process.<sup>416</sup> We believe that this improved communication between BellSouth and its vendor belies commenters' arguments that BellSouth's testing process is flawed. Further, we agree with BellSouth that the presence of pre-release defects did not necessarily guarantee that BellSouth would not make the December 8" release date. Thus, it was appropriate and in compliance with the change control procedures for BellSouth to wait to notify competitive LECs of the defects while there was a chance that Release 11.0 could be timely implemented." We are concerned,

<sup>412</sup> AT&T Nov. 13 *Ex Parte* Letter – OSS at 5-6; Network Telephone Nov. 21 *Ex Parte* Letter at 2. AT&T underscores the fact that in early October, Telcordia discovered ten times the number of pre-release defects found in either Releases 10.5 or 10.6, and that it failed to meet certain deadlines for providing Generally Available code to BellSouth. AT&T Nov. 13 *Ex Parte* Letter – OSS at 5-6.

<sup>413</sup> BellSouth Nov. 20 *Ex Parte* Letter – #1 at 2.

<sup>414</sup> *Id.* at 3.

<sup>415</sup> *Id.*

<sup>416</sup> Similarly, we reject AT&T's argument that Release 11.0 is not more complex than previous software releases. See AT&T Nov. 13 *Ex Parte* Letter – OSS at 4. Evidence in the record shows that the complexity of Release 11.0 is approximately 1.8 to 2.6 times more complex than either Releases 10.5 or 10.6. See BellSouth Nov. 20 *Ex Parte* Letter – #1 at 6. Moreover, BellSouth states that AT&T's analysis is flawed because it used outdated sizing data on the estimated effort required to implement Release 11.0. BellSouth explains that as the software development process moves from the initial specifications into coding and testing, the complexity of the development effort often changes; consequently, the release's size increases from initial estimates. See *id.*

<sup>417</sup> We note that BellSouth has committed to conducting a root-cause analysis of the problems associated with Release 11.0 after it has been implemented. See *id.* at 7. Although AT&T argues that waiting until after implementation to conduct a root-cause shows that BellSouth has not presently determined the cause of Release 11.0's defects, we fail to see the harm in BellSouth's timing. We are persuaded by BellSouth's explanation that were it to direct its vendor to stop work on Release 11.0 to conduct this analysis, the release's integrity could be further impeded. See *id.*

however, that BellSouth did not inform the competitive LECs of its decision to postpone the release at the same time and in the same manner **as** it disclosed its decision to the Commission. We believe that BellSouth must continue to take the necessary step of providing timely, pertinent information to competitive LECs that relates to the change control process. If BellSouth fails to do so in the future, we will pursue appropriate enforcement action.

**124. BellSouth Use of 80 Percent of Production Capacity for Competitive LEC Feature Requests.** We are not persuaded by AT&T's argument that BellSouth is using only **48** percent of its capacity units to implement competitive LEC-initiated change requests.<sup>418</sup> Evidence in the record shows that AT&T's calculations ignore the capacity associated with implementing software and infrastructure changes.<sup>419</sup> When this capacity is included in determining the total capacity allotment for Releases **12** and **13**, competitive LEC changes comprise at least 75.7 percent.<sup>420</sup>

### (c) Quality of Software Releases and Software Defect Corrections

**125.** We find that BellSouth's software releases continue to be compliant with **our** requirements. AT&T's assertion that BellSouth's software releases continue to have high error rates is inconsistent with BellSouth's showing that it has improved the quality of its software releases, and its attention to any defects that may have been discovered **subsequently**.<sup>421</sup> Evidence in the record shows that BellSouth **has** made improvements following the release of the BellSouth **Multistate Order**. For example, BellSouth has implemented a "go/no go" policy for the release of new software. Under this policy, competitive LECs that have utilized BellSouth's pre-ordering and ordering testing environment (the Competitive LEC Application Verification Environment (CAVE)), vote to either recommend or deny the release of new **software**.<sup>422</sup> BellSouth is **also** working with competitive LECs to address defects found in "frozen" maps of interfaces.<sup>423</sup> In addition, BellSouth has hired a third-party vendor to expand BellSouth's internal

<sup>418</sup> See AT&T Nov. 13 **Ex Parte** Letter – OSS at **9**.

<sup>419</sup> See BellSouth Nov. 20 **Ex Parte** Letter – **#1** at **4-5**. These **software** and infrastructure changes include the upgrade to ELMS6 industry release, the change to M-PLEX in order to support both EDI pre-ordering function and Interactive Agent, and the migration to EDI.

<sup>420</sup> See **id**.

<sup>421</sup> AT&T Comments at 12-13; AT&T Bradbury Decl. at paras. **45-50**; AT&T Reply at **14-15**; AT&T Bradbury Reply Decl. at paras. 22-25.

<sup>422</sup> According to BellSouth, in order for competitive LECs to cast a vote to defer the release, there must exist one of the following **two** conditions: an unresolved validated severity level 1 defect or an unresolved validated severity level 2 defect (with no workaround). Only competitive LECs that use interfaces impacted by the release would vote. The vote would take place one week before the scheduled implementation date of the release. BellSouth would then use this recommendation, in conjunction with the recommendations of its quality assurance testing teams and its testing information, to make a final decision on implementation of the release. See BellSouth Stacy Aff. at para. **146**.

<sup>423</sup> **Id** at para. 137. The record shows that when BellSouth issues a new industry standard for an interface, the prior industry standard will be retained or "frozen," with **no** changes being made to it. BellSouth explains that it (continued...)

test deck cases used during internal pre-release testing, which is now available for competitors' use in **CAVE**.<sup>424</sup> Given these types of improvements, BellSouth reports that its most recent software release, Release 10.6, has generated only nine competitive LEC affecting software defects, four of which were identified before the release went into production. Based upon these improvements and the low number of defects in its most recent software release, we find the quality of BellSouth's software releases to be adequate.

126. Similarly, we deny AT&T's assertion that little reliance should be placed upon QP Management Group's (QP) third-party test of BellSouth's software. AT&T alleges that the software evaluation company failed to properly include and identify some of BellSouth's **vendors**.<sup>425</sup> Specifically, AT&T alleges that QP's analysis failed to include both the applications used by one of BellSouth's vendors, Accenture, and the work performed by Electronic Systems, Inc. (ESI).<sup>426</sup> **Contrary** to AT&T's claims, the record shows that QP included Accenture's applications and **ESI's work**.<sup>427</sup> Moreover, QP found that despite the increasing complexity of BellSouth's software releases, the percentage of defects declined, with the ratio of defects per function point decreasing from 0.00708 in Release 10.3 to 0.00146 in Release **10.6**.<sup>428</sup> This function point analysis demonstrates that BellSouth's software Release 10.6 is comparable to the industry's "**best-in-class**."<sup>429</sup> Despite AT&T's complaints about QP's erroneous reliance upon function point **counting**,<sup>430</sup> the record shows that this methodology is the most commonly-used measure of software size for telecommunications companies, that it is the only method supported (Continued from previous page) \_\_\_\_\_

provides support for both the new and **frozen** versions until the next industry standard is issued, and will cure any defects found in the **frozen** version. See *id.* at Ex. **WNS-26** (BellSouth Change Control Process) at **87**.

<sup>424</sup> *Id.* at para. **145**. This expansion of the test bed is directed at detecting migration defects for production releases. BellSouth explains that the expanded set of test cases used first, internally for systems testing, and then the same test cases were tested in **CAVE** to insure that the **CAVE** environment mirrored the internal test environment and the production environment. Among other things, the additional testing identifies any defects from a competitive LEC's vantage point. BellSouth tested approximately **17,000** test cases for Release **10.6** compared to approximately 9,000 used for Release **10.5**. See *id.* at para. **255**.

<sup>425</sup> AT&T Comments at **13**; AT&T Bradbury Decl. at para. **65**.

<sup>426</sup> AT&T Bradbury Decl. at para. **56 n. 18**.

<sup>421</sup> BellSouth Reply at **14**; BellSouth Stacy Reply Aff. at paras. **83-84**.

<sup>428</sup> BellSouth Stacy Reply Aff. at para. **81**. The software industry uses a metric called defect density to measure the success in implementing a defect-free release. This metric compares the number of defects identified to the number of function points implemented in the release on a defects-per-function-point basis. A function point is an industry standard metric for defining the complexity of a given piece of software, based on the business functionality provided by the software. The function points are defined after the analysis of the data functions and transactional function performed by a set of software programs. See BellSouth Stacy Aff. at paras. **248-49**.

<sup>429</sup> BellSouth Nov. 20 *Ex Parte* Letter – #1 at **2**; see also BellSouth Stacy Reply Aff. at para. **81**.

<sup>430</sup> AT&T argues that the report fails to determine the number of defective function points in each of the releases studied. Instead, it only identifies defects without determining their impact upon software users. AT&T also argues that the report is flawed because it converted line counts using unverified data and relied on only **30** instead of **90** days of data taken from Release **10.5**. See AT&T Bradbury Decl. at paras. **51-65**.

by a governing standards body, and that QP conformed to its definitions for counting function points.'"

**127.** We note that during its testing of BellSouth's OSS in Florida, KPMG found deficiencies in the quality of BellSouth's software releases.<sup>432</sup> The Department of Justice also noted that the Commission should continue to monitor ~~this~~ area to assure that competitive LECs do not have OSS access **problems**.<sup>433</sup> During its examination of the adequacy of BellSouth's OSS, the Florida Commission addressed KPMG's findings by ordering the implementation of three new metrics, which measure the quality of BellSouth's software releases.'"\* BellSouth began reporting under these new metrics with the August 2002 performance data. BellSouth's performance for the months of August and September has been satisfactory.'" Moreover, most, if not all, of the improvements mentioned above had not been implemented at the time when KPMG was conducting its testing. Accordingly, we find that BellSouth's implementation of these improvements, and the low defect rate of Release 10.6, adequately address the

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BellSouth Reply at 14; BellSouth Stacy Reply Aff. at paras. **85-88**. BellSouth admits that although there is not a single, uniform technique for sizing software in the telecommunications industry, function point counting is a commonly used measure of **software size** for telecommunications companies, and is the only one supported by a governing standards body (International Function Point Users Group). BellSouth explains that function points act **as** the basis for measuring both productivity and quality. BellSouth states, furthermore, that it recently interviewed four software benchmarking firms: Compass, Meta, Gartner and Q/P Management. BellSouth reports that each of these firms' benchmarking methodology included the use of function points in measuring productivity and quality, **as well as** the use of the defect density metric. Moreover, BellSouth states that QP Management's database includes data for over **10,000** projects from 100 different organizations, including numerous telecommunications software projects. These organizations do use function point counts and the defects per function point metric to benchmark their software quality, productivity, and cost. **See** BellSouth Stacy Reply Aff. at para. **85**.

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KPMG Final Report at 101, 104, 120-21.

<sup>433</sup>

Department of Justice Comments at **8**.

<sup>434</sup>

BellSouth Stacy Aff. at paras. 265-69; BellSouth Stacy Reply Aff. at para. **90**. CM-6 requires that BellSouth timely correct software defects: **10** business **days** for high impact defects; 30 business days for medium impact defects; and 45 days for low impact defects. CM-9 measures the number of defects **in** a release. CM-10 *measures* the quality of a software release **as** determined by a pre-defined set of test cases established in the post-production environment. **See *id.***

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**See** Florida/Tennessee F.10.7 (% competitive LEC Interface Outages Sent within 15 Minutes); Florida/Tennessee F.10.8 (% Software Errors Corrected within 30 Business Days); Florida/Tennessee F.10.9 (% Change Requests Accepted or Rejected within **10** Business Days); Florida/Tennessee F.10.12 (Number of Severity 1 Defects (Type 6 CR) in a Production Release Implemented); Florida/Tennessee F.10.13 (Number of Severity 2 Defects (Type **6** CR) in a Production Release Implemented); Florida/Tennessee F.10.14 (Number of Severity 3 Defects (Type 6 CR) in a Production Release Implemented); and Florida/Tennessee F.10.15 (% Test Deck Weight Failure in Production Release). We note that AT&T asserts that BellSouth has improperly reported its performance for CM-6 and CM-11, and that it, along with other competitive LECs, have provided the Florida Commission with information about BellSouth's alleged improper methodology. **See** AT&T Bradbury Reply Decl. at paras. **26-29**. We find that the state commission is the proper venue to address such concerns. **Thus**, unless the Florida Commission finds that BellSouth inaccurately reported its performance results, we accept BellSouth's performance **as** valid. and do not address AT&T's assertions.

Commission's and the Department of Justice's concerns about BellSouth's software releases.<sup>436</sup> We will continue to monitor this area, **as** recommended by the Department of Justice.

128. We are not persuaded by AT&T's argument that BellSouth's internal software testing is inadequate because it did not prevent customers in Florida and Tennessee from successfully ordering BellSouth Long Distance (BSLD) service."'' Regardless of what enforcement action we may take in the futures with respect to this incident, we do not believe that it mandates a finding of checklist noncompliance with respect to the adequacy of BellSouth's change management processes. BellSouth states that software updates disabled previously-imposed safeguards."'' However, BellSouth further states that its internal testing is sufficient given that of the 87,000 customers who contacted BellSouth's Small Business Customer Service centers from October 1 to October 9, 2002, only seven, or 0.008 percent, were able to actually place orders for **BSLD**.<sup>439</sup>

129. We also find unpersuasive AT&T's assertion that BellSouth corrects lower-impacting defects before it corrects those with higher severity levels.<sup>440</sup> The performance data show that BellSouth has corrected all recently-reported, high-impact defects within 10 days, and that it has corrected **16** other medium- and low-impact defects."'' Although the record also shows that BellSouth has **6** outstanding medium- and low-impact defects to correct in Release **10.6**, we **are** persuaded by BellSouth's explanation that some of these defects could not be corrected until the implementation of Release 11.0 (scheduled for release **on** December 30, 2002) because the Florida Commission order requiring the reduction of defect correction intervals was issued in the midst of a release cycle."'' In fact, **as** discussed in detail above, evidence of improvements in BellSouth's pre-release software testing can be found in BellSouth's decision to postpone Release 11.0 until December 30, 2002 due to the high number of defects identified during pre-release testing."''

<sup>436</sup> **KMF'G** Final Report at 101,104,120-21.

<sup>437</sup> See AT&T Reply at **15**; see also discussion of premature marketing *infra* **Part VII.C**.

<sup>438</sup> See Letter from Jonathan B. Banks, General Attorney, BellSouth, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 02-307 at 1-3 (filed Oct. 29, 2002) (BellSouth **Oct. 29 Ex Parte** Letter – #2).

<sup>439</sup> See *id* at 3.

<sup>440</sup> AT&T Comments at 13; AT&T Bradbury Decl. at paras. 46-50.

<sup>441</sup> BellSouth Reply at 15; BellSouth Stacy Reply Aff. at paras. 99-101.

<sup>442</sup> BellSouth Reply at **15-16**; BellSouth Stacy Reply Aff. at para. 102

<sup>443</sup> BellSouth Reply at 14-15; BellSouth Stacy Reply Aff. at paras. 103-14. BellSouth explains that the competitive LECs chose Option 1 for **the** rescheduled release date for Release 11.0. Release **11.0** is now scheduled for release **on** December 30, 2002. See BellSouth Nov. 7 *Ex Parte* Letter – #1 at 3; BellSouth Nov. 1 *Ex Parte* Letter – #2 at 14. See *supra* paras. 122-23 for discussion of Release 11.0.



130. **Notification Adequacy and Timeliness.** We also find no support for Network Telephone's and WorldCom's complaints that BellSouth has been slow to reveal constraints that may exist before competitors have prioritized their change requests,<sup>444</sup> and that BellSouth is unresponsive to competitive LEC questions.<sup>445</sup> The Department of Justice also notes that BellSouth should discuss its releases openly with competitive LECs when it believes constraints prevent it from following competitive LEC priorities." While we agree with concerns expressed about BellSouth's provision of information, we also believe that BellSouth has improved, and is continuing to improve, its processes in this respect. For instance, BellSouth has made improvements such as lengthening the notification period for retirement of interfaces from 120 to 180 days," providing competitive LECs with information on BellSouth's legacy system releases via the change control process website, and providing competitors with BellSouth maintenance release information via the change control process's Change Control Release Schedule.<sup>448</sup> Moreover, BellSouth now posts all Type 2 through Type 6 change requests to the Flagship Feature Release Schedule.<sup>449</sup> Although BellSouth should continue improving its communications with the competitive LECs, these commenters' assertions do not compel us to retract our previous findings that "BellSouth is providing competitive LECs with sufficient information to be able to make informed decisions regarding prioritization of proposed systems changes."<sup>450</sup> Although not a factor in our decision here, we are encouraged by the fact that BellSouth has committed itself to making capacity information available to competitive LECs in a form similar to that provided to the Commission.<sup>451</sup>

#### **h. Training, Technical Assistance, and Help Desk Support**

131. As we did in the *BellSouth Georgia/Louisiana* and the *BellSouth Multistate Orders*, we find that BellSouth adequately assists competing carriers in their use of available

<sup>444</sup> WorldCom Comments at 5. WorldCom cites the fact that BellSouth has stated that some of its back-end systems can undergo only a limited number of simultaneous changes, but it has not provided information about these constraints. See *id*

<sup>445</sup> Network Telephone Comments at 9.

<sup>446</sup> Department of Justice Comments at 7.

<sup>447</sup> BellSouth *Stacy Aff.* at para. 137.

<sup>448</sup> *Id.* at para. 138.

<sup>449</sup> *Id.* BellSouth explains that once the competitive LECs have prioritized the features that they want changed, BellSouth provides a 12-month view of all Type 2 through 6 change requests that are scheduled, implemented, or targeted features. BellSouth explains that this is commonly called the Flagship Feature Release Schedule. See BellSouth *Stacy Aff.*, Ex. WNS-53. The Flagship Feature Release Schedule is provided to the competitive LECs via e-mail and on the change control process web site, and is discussed in each change control monthly status meeting. *Id.* at paras. 138, 199, 206.

<sup>450</sup> BellSouth *Multistate Order*, 17 FCC Red at 17695-96, para. 182.

<sup>451</sup> BellSouth Nov. 20 *Ex Porte Letter* – #1 at 5-6.

OSS functions.” We reject Network Telephone’s assertion that BellSouth’s “Care Team” service is inadequate because Network Telephone provides no evidence that BellSouth has failed to enable Network Telephone to understand, implement, and use all of the OSS functions available to them.” In fact, the record shows that from April 17–19, 2002, seventeen BellSouth employees traveled to Florida to meet with Network Telephone to discuss operational assistance issues.<sup>454</sup> An outcome of this meeting was the discussion of a single point of contact (“SPOC”) ~~for~~ Network Telephone on operational issues. If Network Telephone believes that BellSouth has failed to uphold its responsibilities in these areas, it may either avail itself of the change management plan’s dispute resolution process or initiate an enforcement proceeding. However, given the lack of substantiating evidence in this proceeding, we find that BellSouth’s showing in this area is the same as, if not better than, that which we found sufficient to meet the requirements of section 271 in the *BellSouth Georgia/Louisiana* and the *BellSouth Multistate Orders*.

## V. OTHER CHECKLIST ITEMS

### A. Checklist Item 4 • Unbundled Local Loops

132. Section 271(c)(2)(B)(iv) of the Act requires that a BOC provide “[l]ocal loop transmission from the central office to the customer’s premises, unbundled from local switching or other services.”” Based on the evidence in the record, we conclude, as did the state commissions,<sup>455</sup> that BellSouth demonstrates that it provides unbundled local loops in accordance with the requirements of section 271 and our rules. As in past section 271 orders, our conclusion is based on our review of BellSouth’s performance for all loop types, including voice grade loops, xDSL-capable loops, high capacity loops, and digital loops, as well as our review of BellSouth’s hot cut, line-sharing, and line splitting processes. We note that, as of July 31, 2002, BellSouth states that it had provisioned 166,168 loops in Florida and 50,886 loops in Tennessee?”

<sup>452</sup> See *BellSouth Multistate Order* 17 FCC at 17712-13, para. 208; *BellSouth Georgia/Louisiana Order*, 17 FCC at 9132, para. 198.

<sup>453</sup> Network Telephone Comments at 11-12. Network Telephone states that the Care Team cannot quickly provide answers to complicated questions, that deadlines are missed, that team members do not have the appropriate level of expertise, and that the Care Team does not have access to the appropriate personnel at BellSouth. *Id.* at 11.

<sup>454</sup> See BellSouth Ruscilli/Cox Reply Aff. at paras. 54-58.

<sup>455</sup> 47 U.S.C. § 271(c)(2)(B)(iv). The Commission has defined the loop as a transmission facility between a distribution frame, or its equivalent, in an incumbent LEC central office, and the demarcation point at the customer premises. Dark fiber and loop conditioning equipment are among the features, functions, and capabilities of the loop. *UNE Remand Order*, 15 FCC Rcd at 3772-73, paras. 166-67 n.301. See Appendix D at paras. 48-52.

<sup>456</sup> See Florida Commission Comments – Hearing at 123-24; Tennessee Authority Comments at 33-34

<sup>457</sup> See BellSouth Application at 84

133. Consistent with ~~our~~ prior section 271 orders, we do not address in detail aspects of BellSouth's loop performance where there is little, if any, dispute in the record that BellSouth's performance complies with the parity and benchmark measures established in the relevant states.<sup>458</sup> **As** in past section 271 proceedings, in the course of ~~our~~ review we look for patterns of systemic performance disparities that have resulted in competitive harm or that otherwise have denied new entrants a meaningful opportunity to **compete**.<sup>459</sup> Although several parties have raised issues with respect to BellSouth's loop performance,<sup>460</sup> ~~our~~ own review of the record shows that BellSouth's performance overall has been satisfactory. Thus, we do not engage in detailed discussion of BellSouth's loop performance. Instead we focus on concerns raised by commenters, where the record indicates significant discrepancies between BellSouth's performance for its competitors and BellSouth's performance for its own retail operations.

134. **Voice Grade Loops.** We find, **as** did the state commissions,<sup>461</sup> that BellSouth provisions voice grade loops to competitors in a nondiscriminatory manner. BellSouth generally meets the benchmark and parity standards for order processing timeliness, installation timeliness, installation quality, and maintenance and repair timeliness and quality of voice grade loops in Florida and Tennessee, with few exceptions.<sup>462</sup> We find that the exceptions to BellSouth's generally nondiscriminatory performance are not competitively significant.<sup>463</sup> We therefore find

<sup>458</sup> See, e.g., *BellSouth Georgia/Louisiana Order*, 17 FCC Rcd at 9144, para. 219; *Verizon Connecticut Order*, 16 FCC Rcd at 14151-52, para. 9.

<sup>459</sup> See, e.g., *Verizon Massachusetts Order*, 16 FCC Rcd at 9055-56, para. 122. We **note** that in its comments, AT&T lists various performance metrics missed by BellSouth. Although AT&T relates some of these missed metrics to alleged competitive impact, much of what AT&T lists demonstrates nothing more than isolated instances, or instances of near-compliance that, **as** we have found in previous orders, have **no** competitive impact. Accordingly, we decline to make a finding of noncompliance based upon AT&T's unsubstantiated allegations. See generally *AT&T Norris Decl.* However, the ~~draft~~ order fully ~~treats~~ those portions of the Norris Declaration that correlate BellSouth performance data to any competitive impact alleged by AT&T in its comments. See also *supra* n.201.

<sup>460</sup> See, e.g., Covad Comments at 25-29; KMC Comments at 15-17.

<sup>461</sup> See Florida Commission Comments – Hearing at 123-24; Tennessee Authority Comments at 33-34.

<sup>462</sup> See, e.g., **Florida/Tennessee B.1.12.8 – B.1.12.9 (FOC Timeliness – Partially Mechanized – 10 Hours, 2 Wire Analog Loops); Florida/Tennessee B.2.18.8 – B.2.18.9 (% Missed Installation Appointments, 2 Wire Analog Loops); Tennessee B.2.19.8 – B.2.19.9 (% Provisioning Troubles Within 30 Days, 2 Wire Analog Loops); Tennessee B.3.1.8 – B.3.1.9 (Missed Repair Appointments, 2 Wire Analog Loops); Florida/Tennessee B.3.4.8 – B.3.4.9 (% Repeat Troubles Within 30 Days, 2 Wire Analog Loops).**

<sup>463</sup> BellSouth missed several months under an order processing timeliness benchmark (95% within 3 hours). See Florida B. 1.9.8 (FOC Timeliness – Mechanized, 2 Wire Analog Loops) (indicating misses in June, **July** and **August**). However, competitive LECs experienced an average of 95.08% within 3 hours for the relevant period. Although BellSouth also missed parity from May-Sept. in Florida under a provisioning timeliness metric (the order completion interval metric), we note that its performance under another measure of installation timeliness, the percent missed installation appointments metric, indicates parity performance **throughout** the relevant period. See Florida B.2.1.9.1.4 (Order Completion Interval, 2 Wire Analog Loops Non-Design/Dispatch) (indicating a disparity from May-Sept.); see also Florida B.2.18 (% Missed Installation Appointments, 2 Wire Analog Loops). In previous orders, we have found the percent missed installation appointments metric more persuasive under comparable circumstances. See, e.g., *Bell Atlantic New York Order*, 15 FCC Rcd at 4063-66, paras. 205-10. BellSouth also (continued....)

that a finding of checklist compliance is warranted despite these exceptions. Should BellSouth's performance in this area deteriorate, we will pursue appropriate enforcement action.

**135. Hot Cut Activity.** We find, **as** did the state **commissions**,<sup>464</sup> that BellSouth is providing voice grade loops **through** hot cuts in accordance with the requirements of checklist item 4.<sup>465</sup> As in the *Georgia/Louisiana* proceeding, Mpower alleges that BellSouth's failure to provide an adequate frame due time (FDT) process violates BellSouth's obligation to provide **nondiscriminatory** access to OSS and to unbundled loops.<sup>466</sup> The Commission did not find Mpower's arguments persuasive in the *BellSouth Georgia/Louisiana Order*,<sup>467</sup> and Mpower provides no new evidence to support its claim in the instant proceeding. Accordingly, we dismiss Mpower's allegations.

**136. Digital Loops.** We find, **as** did the state **commissions**,<sup>468</sup> that BellSouth's performance with respect to digital loops complies with checklist item 4.<sup>469</sup> We recognize,

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suggests that some disparity under the order completion interval metric may be attributable to the fact that competitive LEC orders are scheduled based **on** the standard ordering guide which carries a minimum four-day interval, while the retail analogue for the majority of these orders is residence and business **type** plain old telephone service (POTS) orders that are scheduled on the due date calculator, and may be completed in less than a day. BellSouth Vamer Aff., Ex. PM-2 at para. 139. BellSouth missed parity in Florida for three months under a provisioning quality measure. *See* Florida B.2.19.9.1.4 (**% Provisioning Troubles Within 30 Days, 2 Wire Analog Loops**). We give little weight **to** this reported performance failure, however, in light of BellSouth's explanation that the misses correspond to a small **number** of trouble reports that do not provide a valid comparison to the retail analogue. The low competitive LEC volume of 9 in September makes it difficult to draw further conclusions regarding the data. BellSouth Vamer Aff., Ex. PM-2 at para. 143. BellSouth **also** missed several **months** under a maintenance and repair measure. *See* Florida B.3.2.9.1 (Customer Trouble Report Rate, 2 Wire Analog Loops, Non-Design/Dispatch). However, BellSouth still provided over 97% trouble-free services under this measurement, and the difference in the trouble report rate for competitive LEC lines **was** less than 1% higher than the BellSouth retail analogue. BellSouth Vamer Aff., Ex. PM-2 at para. 148. Therefore, we find that that reported performance failure has little, if any, competitive impact. Finally, we note that BellSouth missed three months in Florida under the missed appointments **metric** for non-dispatch orders. *See* Florida B.3.1.9.2 (Missed Repair Appointments, 2 Wire Analog Loops, Non-Design/Non-Dispatch). BellSouth states that **two** of the **six** missed appointments in May were missed by less than thirty minutes each, and the other four were due to improper order close-out procedures associated with a multi-trouble order for the same customer. BellSouth further states that **two** of the eighteen total missed appointments in July were closed **as** Tested OW Found OK, and **fifteen** of the remaining **16** missed appointments were the result of 2 multiple troubles. BellSouth Varner Aff., Ex. PM-2 at para. 147. We are persuaded by BellSouth's explanations for these performance disparities and find that they have little, if any, competitive impact.

<sup>464</sup> *See* Florida Commission Comments – Hearing at 123-24; Tennessee Authority Comments at 33-34.

<sup>465</sup> *See generally* Appendices B and C.

<sup>466</sup> *See* Mpower Comments at 12-13.

<sup>467</sup> *See BellSouth Georgia/Louisiana Order*, 17 FCC Rcd at 9146, para. 222.

<sup>468</sup> *See* Florida Commission Comments – Hearing at 123-24; Tennessee Authority Comments at 33-34.

<sup>469</sup> BellSouth missed several **months** under an order processing timeliness benchmark (85% within **10** hours). *See* Florida B.1.12.14 (FOC Timeliness – Partially Mechanized – **10** Hours) (Other Design). This category comprises (continued....)

however, that BellSouth's performance in Florida with respect to one installation timeliness measure – the order completion interval metric (dispatch) – was out of parity from May **through** September.'" BellSouth explains, however, that within the mix **of** competitive LEC orders under this measurement, more than half were for unbundled digital channel (UDC) circuits, which are designed circuits requiring approximately 10 days for completion **as** compared to the retail analogue which is heavily weighted toward ADSL circuits requiring approximately **4** days to complete.'" Due **to** BellSouth's explanation, we do not find that the disparity in BellSouth's performance under **this** metric raises an issue of checklist noncompliance. In addition, the data under another installation timeliness metric – percent missed installation appointments – shows that BellSouth provisioned digital loops in a timely fashion during the relevant period.'" In these circumstances, as in previous orders, we conclude that BellSouth's performance under the order completion interval metric has not denied competitive LECs a meaningful opportunity to compete in Florida.'"

137. Contrary to the argument propounded by KMC, we conclude that BellSouth's provisioning and maintenance and repair performance for digital loops warrants a finding of checklist compliance.'" Although BellSouth's installation quality measure for digital loops – the percentage of provisioning troubles within 30 days – was out **of** parity in Florida from May to September,'" BellSouth demonstrates that the majority of these misses were caused by defective plant facilities, central office wiring problems, or incidents where trouble reports were resolved **as** "tested OK/found OK.'" Specifically, BellSouth provides the number of total trouble reports for each month that would be classified under the above categories of troubles, and explains how troubles under these categories often do not reflect the quality of the installation performed by

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several loop types, including digital and high capacity loops. However, competitive LECs experienced an average of 87.03% within 10 hours for the relevant **period**. **Thus**, we do not find these misses to be competitively significant. Should BellSouth's performance in this area deteriorate, we will pursue appropriate enforcement action.

<sup>470</sup> The order completion **interval metric** measures the amount of time it takes BellSouth to actually provide service on the orders it receives from competitive LECs and its own customers. See Florida B.2.1.18.1.1 (Order Completion Interval, Digital Loops <DS1/<10 Circuits/Dispatch) (indicating intervals of 8.89, 7.64, 7.77, 8.24, and 7.99 days for competitive **LECs** and 4.77, 3.69, 3.58, 3.27, and 3.17 days **for** BellSouth's retail operations).

<sup>471</sup> See BellSouth Vamer Aff., Ex. PM-2 at para. 151. BellSouth also states that UDC circuits are not offered **as** retail products. **Id**

<sup>472</sup> See Florida B.2.18.18.1.1 (%Missed Installation Appointments, Digital Loops <DS1/<10 Circuits/Dispatch).

<sup>473</sup> See, e.g., *BellSouth Multistate Order*, 17 FCC Rcd at 17729-30, para. 240.

<sup>474</sup> KMC comments at 15-17.

<sup>475</sup> See Florida B.2.19.1S.1.1 (%Provisioning Troubles within 30 Days, Digital **Loops**<DS1/<10 Circuits/Dispatch) (indicating trouble rates **from** May to September of 7.22%, 6.61%, 6.99%, 8.28%, and 6.96% for competitive LECs, and rates of 4.63%, 4.63%, 5.18%, 4.81%, and 4.03% for BellSouth retail).

<sup>476</sup> See BellSouth Vamer Aff., **Ex.** PM-2 at para. 154.

**BellSouth.**<sup>477</sup> BellSouth further states that it is retraining plant technicians on proper testing and order turn-up procedures. "We agree that several troubles reported under this measure appear to be attributed to causes other than BellSouth's provisioning process, and accordingly find that BellSouth's performance in this area satisfies checklist item 4.

**138.** Similarly, BellSouth's maintenance and repair performance for digital loops was generally in parity during the applicable period.<sup>479</sup> This performance constitutes checklist compliance notwithstanding that one measure of that performance – the customer trouble report rate – was out of parity in Florida and Tennessee throughout much of the relevant period.<sup>480</sup> BellSouth states that in spite of this disparity, 95 percent of the competitive LEC circuits for dispatch and non-dispatch digital loop orders were trouble-free during the relevant period." Because the overall trouble report rate for digital loops that BellSouth provided competitive LECs was low during the relevant period, we find that these disparities lack competitive significance.<sup>482</sup> Moreover, contrary to KMC's assertions, BellSouth was consistently in parity,

<sup>477</sup>

For example, BellSouth explains that incidents of defective plant facilities may occur after BellSouth has installed and tested the facility when a cable gets wet or foreign voltage finds its way onto the facility. Letter from Kathleen B. Levitz, Vice President – Federal Regulatory, BellSouth, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 02-307 at 4 (filed Nov. 13, 2002) (BellSouth Nov. 13 *Ex Parte* Letter – #2). Furthermore, troubles that fall under the tested OK/found OK category would also not appear to indicate that there was an actual problem with the quality of the installation performed by BellSouth. As BellSouth describes, the tested OK/found OK category includes competitive LEC reported troubles where a technician conducts tests in either the repair center, the central office or outside, and finds that the loop is operating without a problem. See Letter from Kathleen B. Levitz, Vice President – Federal Regulatory, BellSouth, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 02-307 at 3 (filed Nov. 18, 2002) (BellSouth Nov. 18 *Ex Parte* Letter – #1). BellSouth shows that when tested OK/found OK reports are removed from the percent provisioning troubles in 30 days metric, the competitive LEC results from May-Sept. are reduced to 6.4%, 5.8%, 6.2%, 7.4% and 5.8% respectively. *Id.* at 2.

<sup>478</sup>

See BellSouth Varner Aff., Ex. PM-2 at para. 154.

<sup>479</sup>

See BellSouth Varner Aff., Ex. PM-33; BellSouth Varner Reply Aff., Ex. PM-15; Letter from Kathleen B. Levitz, Vice President – Federal Regulatory, BellSouth, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 02-307 (filed Nov. 21, 2002) (BellSouth Nov. 21 *Ex Parte* Letter – #1) (listing BellSouth's disaggregated performance under the % Missed Repair Appointments, Maintenance Average Duration, and % Repeat Troubles within 30 Days metrics for digital and high capacity loops). We note that while BellSouth has provided disaggregated maintenance and repair data for digital loops, the Florida interim and Tennessee measurements do not have established metrics for this data. Disaggregated metrics are included under the Florida permanent measurements.

<sup>480</sup>

See *Id.* (listing BellSouth's disaggregated performance under the Customer Trouble Report Rate, Digital Loops<DS1/Dispatch in Florida/Tennessee) (out of parity in Florida and Tennessee from May through September); *id.* (listing BellSouth's disaggregated performance under the Customer Trouble Report Rate, Digital Loops<DS1/Non-Dispatch in Florida/Tennessee) (out of parity in Florida from May through September, and out of parity in Tennessee in May); see also KMC Comments at 16.

<sup>481</sup>

BellSouth Reply at 42; BellSouth Varner Reply Aff. at para. 150.

<sup>482</sup>

BellSouth missed parity with regard to digital loops requiring dispatch in Florida from May through September with customer trouble rates of 1.34%, 1.49%, 1.74%, 1.57%, and 1.40% for competitive LECs, and rates of 0.26%, 0.28%, 0.34%, 0.36%, and 0.28% for BellSouth retail; BellSouth also missed parity in Tennessee from May through (continued..)

with very few repeat troubles, with regard to its measure for repeat troubles within 30 days of maintenance or repair of digital loops.<sup>483</sup>

**139. High Capacity Loops.** We find, as did the state commissions,<sup>484</sup> that BellSouth's performance with respect to high capacity loops complies with checklist item 4.<sup>485</sup> We reach this conclusion despite the fact that BellSouth's performance with respect to some provisioning metrics – including the percentage of missed installation appointments and the percentage of troubles found within 30 days of installation – is out of parity for several months during the applicable period.<sup>486</sup> As we discuss below, however, this performance does not warrant a finding of checklist noncompliance. Isolated cases of performance disparity, especially when the margin of disparity is small, generally will not result in a finding of checklist noncompliance.\*''

**140.** First, we recognize that BellSouth's performance with respect to the missed installation appointments metric was out of parity in Florida and Tennessee for several months during the relevant period.'' BellSouth states that there were only 29 missed appointments in

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September with customer trouble rates of 1.11%, 1.14%, 1.10%, 1.49%, and 0.95% for competitive LECs, and rates of 0.34%, 0.37%, 0.44%, 0.44%, and 0.40% for BellSouth retail. See BellSouth Vamer Aff., Ex. PM-33; BellSouth Vamer Reply Aff., Ex. PM-15; BellSouth Nov. 21 *Ex Parte* Letter – #1. BellSouth missed parity with respect to non-dispatch digital loops in Florida from May through September with customer trouble rates of 0.66%, 0.55%, 0.47%, 0.57%, and 0.49% for competitive LECs, and rates of 0.35%, 0.28%, 0.32%, 0.33%, and 0.31% for BellSouth retail; BellSouth only missed parity in Tennessee in May with a customer trouble rate of 0.71% for competitive LECs, and a rate of 0.32% for BellSouth retail. See BellSouth Vamer Aff., Ex. PM-33; BellSouth Vamer Reply Aff., Ex. PM-15; BellSouth Nov. 21 *Ex Parte* Letter – #1; see also *BellSouth Georgia/Louisiana Order*, 17 FCC Rcd at 9150, para. 230. Should BellSouth's performance in this area deteriorate, we will pursue appropriate enforcement action.

<sup>483</sup> See KMC Comments at 16-17; but see BellSouth Vamer Aff., Ex. PM-33; BellSouth Vamer Reply Aff., Ex. PM-15; BellSouth Nov. 21 *Ex Parte* Letter – #1 (listing BellSouth's disaggregated performance under the % Repeat Troubles within 30 Days metrics for digital and high capacity loops); BellSouth Vamer Reply Aff. at para. 151.

<sup>484</sup> See Florida Commission Comments – Hearing at 123-124; Tennessee Authority Comments at 33-34.

<sup>485</sup> See generally Appendices B and C; see also *supra* n.469.

<sup>486</sup> See Florida/Tennessee B.2.18.19.1.1 (% Missed Installation Appointments, Digital Loops ≥ DS1 / < 10 Circuits/Dispatch); Florida/Tennessee B.2.19.19.1.1 (% Provisioning Troubles within 30 Days, Digital Loops ≥ DS1 / < 10 Circuits/Dispatch).

<sup>487</sup> See *BellSouth Georgia/Louisiana Order*, 17 FCC Rcd at 9144, para. 219; *Verizon Massachusetts Order*, 16 FCC Rcd at 9055-56, para. 122; *Verizon Pennsylvania Order*, 16 FCC Rcd at 17468-69, para. 90 (finding that even "poor" performance with regard to high capacity loops did not warrant a finding of checklist noncompliance for all loop types where high capacity loops represented only a small percentage of all loops ordered by competitors in a state). High capacity loops appear to represent approximately 3.5% and 7.6% of the unbundled loops provisioned to competitive LECs in Florida and Tennessee, respectively. See BellSouth Application App. A, Vol. 3a, Tab F, Affidavit of W. Keith Milner (BellSouth Milner Aff.) at paras. 96, 98.

<sup>488</sup> See Florida B.2.18.19.1.1 (% Missed Installation Appointments, Digital Loops ≥ DS1 / < 10 Circuits/Dispatch) (indicating missed installation appointment rates from May to September of 2.16%, 1.81%, 3.15%, 4.01%, and 4.37% for competitive LECs, and rates of 0.60%, 0.00%, 1.30%, 0.69%, and 1.33% for BellSouth retail); Tennessee B.2.18.19.1.1 (% Missed Installation Appointments, Digital Loops ≥ DS1 / < 10 Circuits/Dispatch) (indicating missed (continued....))

Florida under the missed installation appointment metric from May **through** July for over 1,200 orders, and that the majority of these missed due dates were caused by facility issues where installation of the loop required the construction of additional facilities.<sup>489</sup> Given that the majority of installation appointments were met, and that BellSouth's overall loop performance is satisfactory, we do not find that lack of parity under the missed installation appointments metric for **high** capacity loops warrants a finding of noncompliance in Florida and Tennessee for checklist item 4.

**141.** Next, KMC argues that BellSouth fails **to** achieve parity under the provisioning quality metric measuring the percentage of troubles found within 30 days of **high** capacity loop **installation**.<sup>490</sup> BellSouth states that in Florida the majority of the misses were caused by

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installation appointment rates in May, June, August and September of 6.77%, 9.17%, 7.25%, and 6.38% for competitive LECs, and rates of 2.93%, 4.22%, **3.14%**, and 1.98% for BellSouth retail). KMC argues that BellSouth's loop assignment practices are discriminatory, and result in a greater percentage **of** competitive LEC high capacity loop orders being "held, pending facility" and placed in jeopardy status. KMC Comments at 11; *see* also Letter from Andrew M. Klein, Counsel to KMC, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 02-307, Attach. at 6 (filed Dec. 5, 2002) (KMC Dec. **5 Ex Parte** Letter). According to KMC, BellSouth's jeopardy performance in Georgia and Louisiana has also declined in recent months. *See* KMC Dec. **5 Ex Parte** Letter, Attach. at 7-8. KMC states that this high percentage of jeopardies under BellSouth's facility assignment approach leads to more missed appointments for competitive LECs. KMC Comments at 14; KMC Reply **at** 8. BellSouth, however, explains that the difference in the percentage of competitive LEC and BellSouth orders placed in jeopardy **status** is primarily a reflection of the fact that competitive LECs are targeting business customers in customer locations that **are** typically heavily congested and capacity constrained, whereas BellSouth's retail orders are more widely distributed across a statewide area. *See* Letter from Kathleen B. Levitz, Vice President – Federal Regulatory, BellSouth, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 02-307 at 1-2 (filed Dec. **11, 2002**) (BellSouth Dec. **11 Ex Parte** Letter – #1). According to BellSouth, the percentage of jeopardies issued for competitive LEC orders **in** Georgia and Louisiana has increased, but BellSouth **notes** that jeopardies for BellSouth retail have **also** increased to an even greater degree than for competitive LEC orders. BellSouth Dec. **11 Ex Parte** Letter – #1 at 3. BellSouth states that despite the issuance of jeopardies in Florida and Tennessee, many orders were still completed **as** scheduled. BellSouth Varner Reply Aff. at paras. 127, 129. *But see* Letter from Andrew M. Klein, Counsel to KMC, Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket **No.** 02-307 at 1 (filed Dec. 17, 2002) (KMC Dec. **17 Ex Parte** Letter). In addition, BellSouth states that the majority of missed appointments that did occur were not caused by discriminatory practices, but instead were due to the **fact** that the competitive LEC orders were placed to end-users where facility projects were required to meet the demand. BellSouth Varner Reply Aff. at para. 129. We note that BellSouth's performance reflected by another measure of installation timeliness – the order completion interval metric – indicates parity in both states for all relevant months. *See* Florida/Tennessee B.2.1.19.1.1 (Order Completion Interval, Digital Loops **≥DS1/<10** Circuits/Dispatch).

<sup>489</sup>

*See* BellSouth Varner Aff., Ex. PM-2 at para. 153.

<sup>490</sup>

KMC Comments at 15-16. As with missed appointments, KMC suggests that the high percentage of jeopardies under BellSouth's facility assignment approach contributes to the greater number of provisioning troubles. *See supra* n.488; KMC Reply at 8-9. *See also* Florida/Tennessee B.2.19.19.1.1 (% Provisioning Troubles within 30 Days, Digital Loops **≥DS1/<10** Circuits/Dispatch) (BellSouth missed parity in Florida in May, July, August and September with trouble rates of 11.17%, 10.57%, 9.93%, and 12.04% for competitive LECs, and rates of 6.89%, 5.41%, 6.36%, and 2.07% for BellSouth retail; BellSouth missed parity in Tennessee in May, July, August, and September with trouble rates of 19.23%, 14.41%, 18.92%, and 16.58% for competitive LECs, and rates of 5.51%, 6.63%, 3.52%, and 3.92% for BellSouth retail). Performance under these measures is within the range accepted in previous BellSouth applications.



defective plant facilities, central office wiring problems or incidents where trouble reports were resolved **as** tested OK/found OK.<sup>491</sup> BellSouth **also** specifically states that in Tennessee, forty percent of the reports were closed **as** no trouble found, while the remainder were equally spread between outside facilities and equipment within the central office.<sup>492</sup> As discussed above, we agree that several troubles reported under this measure appear to be attributed to causes other than BellSouth's own provisioning process. Data provided by BellSouth show for example that 13 of the 39 total trouble reports reported in September for **high** capacity loops in Florida fell under the category of loops that actually were tested OK or found OK." Given this evidence, and recognizing BellSouth's generally acceptable performance for other categories of loops, we find that BellSouth's performance is in compliance with checklist item 4"

142. KMC **also** contends that BellSouth's maintenance and repair performance for high capacity loops precludes a finding of checklist compliance." In particular, KMC points to BellSouth's performance under the percentage of repeat troubles within 30 days and the customer trouble report rate.<sup>496</sup> With respect to BellSouth's performance under the repeat troubles metric in Florida and Tennessee, we find that contrary to KMC's claim, results during the relevant period indicate nondiscriminatory performance for BellSouth's maintenance and repair of high capacity loops.<sup>497</sup> The customer trouble report rate, however, was out of parity in Florida and Tennessee throughout the relevant period." BellSouth states that one explanation for this

<sup>491</sup> See BellSouth Vamer Aff., Ex. PM-2 at para. 154; *see also* BellSouth Dec. 11 *Ex Parte* Letter – #1 at 5-6. But *see* KMC Dec. 17 *Ex Parte* Letter at 3.

<sup>492</sup> See BellSouth Vamer Aff., Ex. PM-3 at para. 149.

<sup>493</sup> See BellSouth November 13 *Ex Parte* Letter – #2 at 4. BellSouth shows that when tested OK/found OK reports are removed from the percent provisioning troubles in 30 days metric, the competitive LEC results in May, July, August and September are reduced to 8.6%, 7.3%, 6.5%, and 8.0% respectively. BellSouth Nov. 18 *Ex Parte* Letter – #1.

<sup>494</sup> Should BellSouth's performance in this area deteriorate, we will pursue appropriate enforcement action.

<sup>495</sup> KMC Comments at 17.

<sup>496</sup> KMC Comments at 16-17. As with missed appointments, KMC suggests that the high percentage of jeopardies under BellSouth's facility assignment approach contributes to the greater number of customer trouble reports. *See supra* n.488; KMC Reply at 8-9.

<sup>497</sup> See BellSouth Vamer Aff., Ex. PM-33; BellSouth Nov. 21 *Ex Parte* Letter – #1 (listing BellSouth's disaggregated performance under the % Repeat Troubles Within 30 Days metric for digital and high capacity loops) (indicating parity performance 60m May-Sept. for dispatch/non-dispatch **high** capacity loop orders in Tennessee, and parity performance for every month during the relevant period except August for dispatch/non-dispatch high capacity loop orders in Florida). *See also* BellSouth Dec. 11 *Ex Parte* Letter – #1 at 7.

<sup>498</sup> See BellSouth Vamer Aff., Ex. PM-33; BellSouth Vamer Reply Aff., Ex. PM-15; BellSouth Nov. 21 *Ex Parte* Letter – #1 (listing BellSouth's disaggregated performance under the Customer Trouble Report Rate, Digital Loops>=DS1/Dispatch in Florida/Tennessee) (out of parity in Florida and Tennessee from May through September); *id.* (discussing BellSouth's disaggregated performance under the Customer Trouble Report Rate, Digital Loops>=DS1/Non-Dispatch in Florida/Tennessee) (out of parity in Florida and Tennessee from May through (continued...))

disparity is that the retail analogue for these circuits includes many interoffice circuits that use fiber facilities running between central offices at the DS-3 level, and which **are** less complex, and thus less prone to the technical problems that give rise to customer trouble reports, than the DS-1 competitive LEC circuits that have additional circuit equipment.'" BellSouth also states that, in spite of the performance disparity, 95 percent of the competitive LEC circuits for dispatch and non-dispatch **high** capacity loop orders were trouble free during the relevant **period**.<sup>500</sup> Because the overall trouble report rate for high capacity loops that BellSouth provided competitive LECs **was** low during the relevant period, we find that these disparities lack competitive significance, and that BellSouth's maintenance and repair performance for high capacity loops warrants a finding of checklist **compliance**.<sup>501</sup>

**143.** AT&T asserts that BellSouth fails to satisfy checklist item **4** because it fails to provide a reasonable and cost-based method of converting special access DS-1 circuits to TELRIC-priced unbundled loops.<sup>502</sup> Specifically, AT&T states that BellSouth's conversion process requires the issuance of a disconnect order for the special access DS-1 in addition to a new connect order for the UNE loop, risking disruption of **service**.<sup>503</sup> AT&T further states that BellSouth does not dispute AT&T's right to convert the special access circuit to an unbundled loop, only the process of conversion.<sup>504</sup> In response, BellSouth **argues** that its interconnection (Continued from previous page) \_\_\_\_\_

September); *see also* KMC Comments at 9, 16 (stating that despite the fact that in most cases high capacity loops constitute a small percentage of overall loops provided, the out of parity trouble rate for high capacity loops affects a competitive LEC customer base equivalent to between **156,240** and **4,374,720** voice grade lines depending on whether all of the **6,510** circuits are on **DS-1** or **DS-3** high capacity loops).

<sup>499</sup>

See BellSouth Varner Reply Aff. at para. **150**. BellSouth also notes that KMC's argument regarding the voice grade line equivalent for these high capacity loops assumes that each **DS-1** and **DS-3** is completely **full**, which is not the case. See BellSouth Varner Reply Aff. at para. **150**.

<sup>500</sup>

BellSouth Reply at **42**; BellSouth Varner Reply Aff. at para. **150**; *see also* BellSouth Dec. **11 Ex Parte** Letter – #1 at **6**.

<sup>501</sup>

BellSouth missed parity with regard to high capacity loops requiring dispatch in Florida from May through September with customer trouble rates of **3.55%**, **3.34%**, **3.59%**, **3.10%**, and **3.03%** for competitive LECs, and rates of **0.26%**, **0.28%**, **0.34%**, **0.36%**, and **0.28%** for BellSouth retail; BellSouth also missed parity in Tennessee from May through September with customer trouble rates of **3.30%**, **3.03%**, **4.40%**, **3.91%**, and **3.25%** for competitive LECs, and rates of **0.34%**, **0.37%**, **0.44%**, **0.44%**, and **0.40%** for BellSouth retail. See BellSouth Varner Aff., Ex. **PM-33**; BellSouth Varner Reply Aff., Ex. **PM-15**; BellSouth Nov. **21 Ex Parte** Letter – #1. BellSouth missed parity with respect to non-dispatch high capacity loops in Florida from May through September with customer trouble rates of **1.44%**, **1.32%**, **1.44%**, **1.26%**, and **1.31%** for competitive LECs, and rates of **0.35%**, **0.28%**, **0.32%**, **0.33%**, and **0.31%** for BellSouth retail; BellSouth missed parity in Tennessee from May through September with customer trouble rates of **1.38%**, **1.48%**, **1.43%**, **1.60%**, and **1.46%** for competitive LECs, and rates of **0.32%**, **0.32%**, **0.35%**, **0.38%**, and **0.28%** for BellSouth retail. See BellSouth Varner Aff., Ex. **PM-33**; BellSouth Varner Reply Aff., Ex. **PM-15**; BellSouth Nov. **21 Ex Parte** Letter – #1; *see also* **BellSouth Georgia/Louisiana Order**, 17 FCC Rcd at **9150**, para. **230**.

<sup>502</sup>

AT&T Comments at **19-20**.

<sup>503</sup>

AT&T Comments at **19-20**. AT&T also suggests that current single order alternatives are cost prohibitive. *Id.* at **20**.

<sup>504</sup>

AT&T Comments at **19n.13**.

agreement provides only for the conversion of special access to UNE combinations and does not provide for, or require, conversions of access or tariffed services to stand-alone UNEs.<sup>505</sup> Based on the limited factual record, and the time constraints associated with section 271 proceedings, we find that this competitive LEC-specific dispute is more appropriately addressed in an adjudicatory proceeding in the appropriate forum. Thus we find that a finding of checklist compliance is warranted despite AT&T's allegations.

**144. Line Sharing.** We find, as did the state commissions,<sup>506</sup> that BellSouth offers nondiscriminatory access to the high frequency portion of the loop in Florida and Tennessee.<sup>507</sup> BellSouth has provisioned 2,850 line sharing arrangements in Florida and 931 line sharing arrangements in Tennessee, as of July 2002.<sup>508</sup> We recognize that BellSouth's performance in Florida and Tennessee, with respect to one installation timeliness measure – the order completion interval metric (dispatch) – was out of parity for several months.<sup>509</sup> We note, however, that the data under another installation timeliness metric – percent missed installation appointments – shows that BellSouth generally provisioned line shared loops in a timely fashion during the relevant period? Accordingly, we find that BellSouth's provisioning of line-shared loops satisfies checklist item 4. Should BellSouth's performance in this area deteriorate, we will pursue appropriate enforcement action.

**145.** Covad raises issues regarding BellSouth's performance under the percent provisioning troubles within 30 days of installation, the maintenance average duration, and the percent repeat troubles within 30 days metrics.<sup>511</sup> BellSouth states that despite the disparity under

<sup>505</sup>

BellSouth Ruscilli/Cox Reply Aff. at para. 25. BellSouth submits that its project management offer to facilitate the conversion of special access to stand-alone UNEs goes beyond its obligations. BellSouth Ruscilli/Cox Reply Aff. at paras. 26-27.

<sup>506</sup>

See Florida Commission Comments – Hearing at 123-24; Tennessee Authority's Comments at 33-34.

<sup>507</sup>

The D.C. Circuit recently stated that “the *Line Sharing Order* must be vacated and remanded.” *USTA v. FCC*, 290 F.3d 415, 429 (D.C. Cir. 2002). The court also stated that it “grant[ed] the petitions for review[] and remand[ed] the *Line Sharing Order*. . . to the Commission for further consideration in accordance with the principles outlined.” *Id.* at 430. We are addressing the line sharing rules as part of our *Triennial Review Proceeding*. See *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 16 FCC Rcd 22781, 22805, paras. 53-54 (2001).

<sup>508</sup>

See BellSouth Application at 97.

<sup>509</sup>

See Florida B.2.1.7.3.1 (Order Completion Interval, <6 Circuits/Dispatch); Florida B.2.1.7.3.2 (Order Completion Interval, <6 Circuits/Non-Dispatch); Tennessee B.2.1.7.3.2 (Order Completion Interval, <6 Circuits/Non-Dispatch).

<sup>510</sup>

See Florida B.2.18.7.1.1 (% Missed Installation Appointments, Line Sharing/<10 Circuits/Dispatch); Florida B.2.18.7.1.2 (% Missed Installation Appointments, Line Sharing/<10 Circuits/Non-Dispatch); Tennessee B.2.18.7.1.2 (% Missed Installation Appointments, Line Sharing/<10 Circuits/Dispatch).

<sup>511</sup>

Covad Comments at 25-29. As in prior section 271 orders, performance data relative to competitive LECs on an aggregate basis is the most persuasive evidence of whether a BOC meets the checklist requirements. See, e.g., *BellSouth MultiState Order*, 17 FCC Rcd at 17727, para. 237; *BellSouth Georgia/Louisiana Order*, 17 FCC Rcd at 9148, para. 226. Thus, although Covad claims that its data show discriminatory performance, allegedly anomalous (continued....)

the provisioning troubles within 30 days of installation metric, the results indicate a very high incidence of trouble reports that were resolved **as tested OWfound OK** in Florida for both dispatch and non-dispatch orders.” BellSouth further states that misses in Tennessee under the maintenance average duration metric are again largely due to delays caused by a very high incidence of trouble reports closed **as tested OK/found OK**.” Given the totality of circumstances, we conclude that BellSouth’s performance under these metrics is consistent with satisfactory performance of this checklist item. We also note that despite Covad’s claims of discriminatory performance under the percent repeat troubles within 30 days metric, BellSouth achieved parity under this metric for all relevant months in Tennessee, and all but one month in Florida.<sup>514</sup>

**146. UNE ISDN Loops.** We find, **as did the state commissions:**” that BellSouth provides **ISDN** loops to competitors in a nondiscriminatory manner. BellSouth’s performance data demonstrate that, for the most part, it met the relevant benchmarks and parity standards,<sup>516</sup> notwithstanding that the data reveal some performance issues with respect to ordering and a maintenance and repair measure. First, with respect to the order processing timeliness metric, Firm Order Confirmation (FOC) timeliness, we recognize that BellSouth’s performance misses the relevant benchmarks for partially mechanized orders for several months?” BellSouth

(Continued from previous page)

results for a single carrier in this instance are insufficient to rebut BellSouth’s evidence demonstrating checklist compliance. If evidence becomes available to the Commission in the future sufficient to show systemic performance disparities, we will pursue appropriate enforcement action.

<sup>512</sup>

BellSouth Reply at 40; BellSouth Vamer Reply Aff. at para. 143 (indicating that 39% of the troubles for dispatch line sharing orders were closed **as tested OWfound OK** in May, 23% in June, 50% in July, and 31% in August). BellSouth states that when tested OWfound OK reports are removed from this metric for non-dispatch line sharing orders in Florida, the results in May, June, July, and August are 4.6%, 9.6%, 5.4% and 4.5% respectively. BellSouth Vamer Reply Aff. at para. 144. BellSouth also states that when tested OWfound OK reports are removed from Tennessee results, the percentage of troubles within 30 days are quite small. BellSouth Reply at 41; BellSouth Vamer Reply Aff. at para. 144 (indicating that results under this metric would have been 2.8% and 4.2% respectively if the tested OWfound OK reports are removed for July and August).

<sup>513</sup>

BellSouth Reply at 41; BellSouth Vamer Reply Aff. at para. 146. As noted above, troubles that fall under the tested OWfound OK category would not appear to indicate that there was an actual problem with the quality of the installation performed by BellSouth. See *supra* n.477.

<sup>514</sup>

See BellSouth Reply at 41.

<sup>515</sup>

See Florida Commission Comments – Hearing at 123-24; Tennessee Authority Comments at 33-34.

<sup>516</sup>

See, e.g., Florida/Tennessee B.2.1.6.3.1 (Order Completion Interval, UNE ISDN/<6 Circuits/Dispatch); Florida/Tennessee B.2.18.6.1.1 (%Missed Installation Appointments, UNE ISDN/<10 Circuits/Dispatch).

<sup>517</sup>

See Florida B.1.12.6 (FOC Timeliness – Partially Mechanized – 10 hours, ISDN Loops (UDN, UDC)) (in Florida, BellSouth missed the 85% within 10 hours benchmark from June–Sept., the results are 82.05%, 70.83%, 80.95%, 83.33%, respectively); Tennessee B.1.12.6 (FOC Timeliness – Partially Mechanized – 10 hours, ISDN Loops (UDN, UDC)) (in Tennessee, BellSouth missed the 85% within 10 hours benchmark in June and July, the results are 81.82% and 80.00%, respectively). We note that AT&T generally comments about BellSouth’s performance in Florida and Tennessee with respect to the FOC timeliness partially mechanized submetric. AT&T Norris Decl. at paras. 18, 51; see also *supra* n.201.

explains that the volumes decreased to such low levels in recent months that to meet the 85 percent in 10-hours benchmark in any given month, BellSouth could not miss more than four LSRs in Florida and could not miss any LSRs in Tennessee?” BellSouth adds that steps have been taken to improve performance, such as the implementation of new computer tools and periodic operational reviews.” Given this, and the fact that the order volumes were low for this submetric, we find that these performance discrepancies are not competitively significant. We also reject AT&T’s claim that BellSouth’s performance for the percentage of jeopardy notices for mechanized ISDN loops, which is out of parity throughout the relevant period in Florida and Tennessee, demonstrates BellSouth’s noncompliance with this checklist item.<sup>520</sup> We believe that BellSouth’s failing to meet the parity standard for such jeopardy notices has little competitive impact because BellSouth ultimately provisioned the ISDN loop in a timely manner.<sup>521</sup> Should BellSouth’s performance in this area deteriorate, we will pursue appropriate enforcement action.

147. Finally, even though BellSouth’s data reveal some performance disparities with respect to the maintenance and repair of ISDN loops, BellSouth’s overall performance in this area complies with checklist item 4. Specifically, BellSouth was out of parity with respect to the customer trouble report rate for several months in Florida.” BellSouth states that a large proportion of the reported troubles were due to defective cable pairs or circuit cards that had to be “reseated.”” BellSouth adds that with respect to the circuit cards, the problem may be

<sup>518</sup>

BellSouth Vamer Reply Aff. at paras. 160-61. Volumes dropped off substantially after May 2002 in Florida and Tennessee. In Florida, on average, from June-Sept., there were approximately 25 orders a month. In Tennessee, for these same months, there were approximately 7 orders a month, on average. See Florida/Tennessee B.1.12.6 (FOC Timeliness – Partially Mechanized – 10 hours, ISDN Loops (UDN, UDC)).

<sup>519</sup>

BellSouth Vamer Reply Aff. at para. 161.

<sup>520</sup>

See AT&T Noms Decl. at paras. 20, 56; Florida B.2.5.6 (% Jeopardies – Mechanized, UNE ISDN) (out of parity in May-Sept.); Tennessee B.2.5.6 (% Jeopardies – Mechanized, UNE ISDN) (out of parity in May, July-Sept.).

<sup>521</sup>

Jeopardy notices warn competitive LECs that BellSouth may miss an installation appointment. BellSouth Vamer Aff., Ex. PM-2 at para. 141. In its reply, BellSouth points out that AT&T failed to mention that BellSouth met almost all of the % Missed Installation Appointment metrics and added that “the jeopardy percentage was not indicative of whether the appointment was actually made.” BellSouth Vamer Reply Aff. at para. 129. BellSouth met or exceeded the missed installation appointment submetric with one minor exception in Florida. See Florida B.2.18.6.1.1 (% Missed Installation Appointments, UNE ISDN/ < 10 Circuits/Dispatch).

<sup>522</sup>

See Florida B.3.2.6.1 (Customer Trouble Report Rate, UNE ISDN/Dispatch) (out of parity May-Sept.). However, we note that BellSouth met or exceeded the parity standard for metrics measuring the percentage of missed repairs, maintenance average duration, and the percentage of repeat troubles with two minor exceptions. See Florida B.3.3.6.2 (Maintenance Average Duration, UNE ISDN/Non-Dispatch) (out of parity in June and September); Florida B.3.4.6.1 (% Repeat Troubles within 30 days, UNE ISDN/Dispatch) (out of parity in June).

<sup>523</sup>

BellSouth Application at 95; BellSouth Vamer Reply Aff. at para. 164; Letter from Kathleen B. Levitz, Vice President – Federal Regulatory, BellSouth, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 02-307 at 2 (filed Nov. 12, 2002) (BellSouth Nov. 12 Ex Parte Letter). BellSouth explains that when a circuit card has to be “reseated” this means that a technician removes a plug-in card associated with an ISDN h e and then reinserts that card into the same slot. BellSouth Nov. 12 Ex Parte Letter at 2.

attributable to a customer's defective modem or computer? and claims that its performance is excellent when viewing the metric from the converse perspective – trouble-free lines – which is 97 percent for both wholesale and retail **customers**.<sup>525</sup> The record shows that BellSouth has not identified any persistent problems and seeks ways to improve performance by holding monthly Outside Plant Improvement committees aimed at addressing these types of **problems**.<sup>526</sup> Moreover, the disparity between BellSouth retail and competitive LEC performance is small for this submetric.” Accordingly, we find that BellSouth's performance overall for ISDN loops warrants a finding of checklist compliance.

## B. Checklist Item 11 – Number Portability

148. Section 271(c)(2)(B)(xi) of the Act requires a BOC to comply with the number portability regulations adopted by the Commission pursuant to section 251.<sup>528</sup> Section 251(b)(2) requires all LECs “to provide, to the extent technically feasible, number portability in accordance with requirements prescribed by the **Commission**.”<sup>529</sup> Based on the evidence in the record, we find, as did the state commissions,<sup>530</sup> that BellSouth complies with the requirements of checklist item 11.<sup>531</sup>

149. We reject **AT&T's** claim that BellSouth has failed to comply with its number portability obligation because BellSouth will not process AT&T's order to port telephone numbers for certain larger businesses until **AT&T** provides clarification on the disposition of BellSouth's retail access **facility**.<sup>532</sup> **AT&T** states that it has escalated this issue to BellSouth's Vice President of Interconnection Services, but that BellSouth refuses to modify its policy?” In response, BellSouth states that it does not refuse to port any **number**.<sup>534</sup> Instead, BellSouth

<sup>524</sup> *Id.* According to BellSouth, a defective modem or computer may seize the line but does not release when the transmission is complete. *Id.* As a result, the line is unavailable. *Id.*

<sup>525</sup> BellSouth Varner Reply Aff. at para. 162.

<sup>526</sup> *Id.* at para. 164.

<sup>527</sup> Florida B.3.2.6.1 (Customer Trouble Report Rate, UNE ISDN/Dispatch) (generally equal to or less than 1.5% difference between BellSouth retail and wholesale performance).

<sup>528</sup> 47 U.S.C. § 271(c)(2)(B)(xi).

<sup>529</sup> 47 U.S.C. § 251(b)(2).

<sup>530</sup> Florida Commission Comments – Hearing at 179; Tennessee Authority Comments at 39.

<sup>531</sup> BellSouth Reply at 43-44; BellSouth Ainsworth Reply Aff. at paras. 22-24 (describing BellSouth's compliance with this checklist item).

<sup>532</sup> AT&T Comments at 17-19; AT&T Berger Decl. at paras. 4-5; AT&T Reply at 33-34; AT&T Reply App., Tab B, Reply Declaration of Denise Berger (AT&T Berger Reply Decl.) paras. 12-16.

<sup>533</sup> AT&T Berger Decl. para. 10; AT&T Reply at 33-34; AT&T Berger Reply Decl. para. 19.

<sup>534</sup> BellSouth Reply at 43.

acknowledges that it seeks clarification for certain complex services involving direct inward dialing **as** part of the transfer of a customer's service from BellSouth to a competitive LEC.<sup>535</sup> BellSouth explains that this clarification is necessary to avoid unnecessary billing to the competitive LEC's new customer and to enable BellSouth to efficiently deploy its network facilities.<sup>536</sup> We find that the impact of BellSouth's number porting process on the competitive LEC appears to be limited to a relatively small percentage of orders placed?" Moreover, **as** AT&T was the only competitive LEC that complained about BellSouth's number porting policy, there is no evidence that this is a systemic problem. Accordingly, we find checklist compliance.

**150.** We reject Network Telephone's assertion that it has experienced delays in the porting of numbers and that this problem may result from BellSouth's interface with NeuStar, the vendor that operates the Number Portability Administration Center (NPAC).<sup>538</sup> Network Telephone believes that the problem may stem from BellSouth's interface, in spite of the fact that the NeuStar configuration is the same for BellSouth **as** for other incumbent LECs.<sup>539</sup> BellSouth explains that it is only involved in the first two steps of a five-step process whereby a number is ported from BellSouth to Network Telephone.<sup>540</sup> BellSouth posits that of the remaining three steps, which take place solely between Network Telephone and NeuStar, the problem seems to be occurring between steps four and five of this process.<sup>541</sup> Furthermore, Network Telephone has not provided documentation or specific examples of this problem, nor **has** any other competitive LEC raised this issue in the instant proceeding."\* In addition, BellSouth states that, overall, Network Telephone's ports represent less than one percent of the total ports involving BellSouth and an even smaller percentage of the total records sent from the NPAC to BellSouth in any

<sup>535</sup>

*Id.*; BellSouth Ainsworth Reply Aff. at paras. **22-24** (outlining BellSouth's policy).

<sup>536</sup>

BellSouth Reply at **43**; BellSouth Ainsworth Reply Aff. at paras. **22-24** (explaining that the policy is in place to protect the end user from unnecessary inconvenience and potential billing disputes).

<sup>537</sup>

Letter from Kathleen B. Levitz, Vice President – Federal Regulatory, BellSouth, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. **02-307** (filed Nov. **14, 2002**) (BellSouth Nov. **14** ~~Ex Parte~~ Letter – #4) (*providing confidential information*).

<sup>538</sup>

Network Telephone Comments at **8**

<sup>539</sup>

*Id.*

<sup>540</sup>

BellSouth Stacy Reply Aff. at para. **213-14**. In the affidavit, the process is described in the following order: 1) Network Telephone **sends** a LSR to BellSouth requesting a LNP transaction and sends a Create subscription Version transaction to NeuStar; 2) BellSouth processes this order, returns a FOC to Network Telephone, and sends a Subscription Version Concurrence to NeuStar; 3) the preparatory computer work has been done, and the control of the porting transaction is in Network Telephone's control; 4) on the due date for the port transaction, Network Telephone sends an Activate Port message to NeuStar; 5) NeuStar processes the activate message, and sends a port activation message to all LNP service providers in the region to update their databases, and begins routing the number to the Network Telephone switch. *Id.*

<sup>541</sup>

*Id.*

<sup>542</sup>

BellSouth Reply at **44**; BellSouth Stacy Reply Aff. at para. **215**.

given month?” BellSouth also notes that NeuStar **has** publicly acknowledged experiencing capacity issues **with** NPAC, which may be relevant to Network Telephone’s **concern**.<sup>544</sup> Based on the record before us, we conclude that Network Telephone’s allegations do not undermine **our** overall finding of BellSouth’s compliance with checklist item 11.

### C. Checklist Item 13 – Reciprocal Compensation

151. Section **271(c)(2)(B)(xiii)** of the Act requires that a BOC enter into “[r]eciprocal compensation arrangements in accordance with the requirements of section **252(d)(2)**.”<sup>545</sup> In turn, section **252(d)(2)(A)** specifies when a state commission may consider the terms and conditions for reciprocal compensation to be just and reasonable.” Based on the record, we conclude, **as** did the state commissions, that BellSouth demonstrates that it provides reciprocal compensation **as** required by checklist item 13.

152. KMC alleges that, beginning in June 2000, BellSouth has failed to pay reciprocal compensation for a “significant portion” of the traffic that KMC transported and terminated for **BellSouth**.<sup>547</sup> According to **KMC**, BellSouth owes KMC over \$6 million region-wide, including Florida and Tennessee,<sup>548</sup> in unpaid reciprocal **compensation**.<sup>549</sup> The \$6 million figure represents 38 percent of the **total** amount of reciprocal Compensation that KMC **has** billed to BellSouth, in Florida and Tennessee, the unpaid amounts represent 36 and 69 percent, respectively, of KMC’s billings **to BellSouth**.<sup>550</sup> **KMC** claims that BellSouth is violating both the interconnection agreement and checklist item 13 by failing to make these payments?”

153. BellSouth responds that, beginning in March 2000, it invoked the dispute resolution provisions of the interconnection agreement to protest some of the reciprocal

<sup>543</sup> BellSouth Stacy Reply Aff. at *para.* 215.

<sup>544</sup> BellSouth Reply at 44; *see also* BellSouth Stacy Reply Aff. at *para.* 215. *See generally* BellSouth Stacy Reply Aff., Ex. WNS-32 (NeuStar documents dealing with NPAC capacity issues).

<sup>545</sup> 47 U.S.C. § 271(c)(2)(B)(xiii). *See* Appendix D at *para.* 66.

<sup>546</sup> 47 U.S.C. § 252(d)(2)(A).

<sup>547</sup> KMC Comments at 6. *See also* KMC Reply at 2-7

<sup>548</sup> The specific monetary figure in dispute in Florida and Tennessee is confidential. *See* KMC Reply at 2 n.3. We consider KMC’s allegations only to the extent that they concern Florida and Tennessee. The record in the other **six** BellSouth states is not before **the** Commission in this application, and it would therefore be inappropriate for **us** to consider KMC’s allegations outside Florida and Tennessee.

<sup>549</sup> KMC Comments at 6 and n.16. *See also* BellSouth Ruscilli/Cox Reply Aff. at *para.* 29.

<sup>550</sup> KMC Reply at 3.

<sup>551</sup> KMC Comments at 5-8. KMC treats its allegations **as** separate violations of checklist items 1 and 13, *see id.* at 6-7 and KMC Reply at 7, but we discuss these claims **as arising** primarily under checklist item 13. For the **same** reasons that we find **no** violation of checklist item 13, we find that BellSouth **has** not violated checklist item 1.



compensation monies claimed by KMC.<sup>552</sup> The interconnection agreement requires each party to notify the other **upon** the discovery of a billing dispute.” BellSouth noticed a discrepancy between the amount of BellSouth-originated usage that KMC invoiced and the amount that BellSouth’s records showed **as appropriate**.<sup>554</sup> BellSouth identified two possible sources for the discrepancy: (1) double-billing for third-party originated traffic; and (2) transit **traffic**.<sup>555</sup> BellSouth asserts that it requested additional information about this **traffic** in May 2002 and that KMC **has** not provided it.<sup>556</sup> BellSouth also asserts that it has properly raised a legitimate billing dispute with KMC and that BellSouth is not obligated to pay KMC the disputed amounts until the traffic in the disputed invoices can be verified **as** originated by **BellSouth**.<sup>557</sup> In any event, BellSouth argues that KMC’s allegations do not amount to checklist violations but rather concern BellSouth’s performance under the interconnection agreement.” According to BellSouth, disputes about whether a carrier is complying with an interconnection agreement should be handled by the state commissions in the first instance?”

**154.** In its reply, KMC contends that this is not a dispute about conflicting interpretations of an interconnection agreement. It is a simple violation of the statute, according to KMC. BellSouth has allegedly failed to provide interconnection “in accordance with the terms of the agreement,” a violation of section **251(c)(2)**, and failed to pay KMC monies owed in reciprocal compensation in Florida and Tennessee, **a** violation of **252(d)(2)**. KMC argues that, because the Act establishes these obligations, any BellSouth failure to pay in accordance with the interconnection agreement violates the Act and prevents a finding of checklist compliance.

**155.** On the merits, we are not persuaded that BellSouth is obligated to pay reciprocal compensation for **traffic** that it is properly challenging pursuant to the dispute resolution

<sup>552</sup> Letter ~~from~~ Glenn T. Reynolds, Vice President – Federal Regulatory, BellSouth, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket 02-37 (filed Oct. 18, 2002) (**attaching** Letter from Jerry Hendrix, Assistant Vice President, BellSouth, to Riley M. Murphy, Senior Vice President **Legal** Affairs, KMC (Oct. 18, 2002) (providing chronology of parties’ communications and stating that “BellSouth has not withheld any monies owed to KMC,” that “BellSouth has issued a formal written dispute addressing each unpaid amount,” and that, “[t]o date, KMC has not submitted any documentation to support its \$8,020,954 claim”).

<sup>553</sup> BellSouth Ruscilli/Cox Reply Aff. **at** para. 30 (citing Section **3.1.1** of Attach. 7 of the interconnection agreement).

<sup>554</sup> **Id**

<sup>555</sup> **Id** at paras. 31-32.

<sup>556</sup> **Id** at para. 31. BellSouth seeks information from KMC to determine whether some of the traffic for which KMC seeks compensation is transit traffic. **Id** at para. 34. **In** addition, BellSouth states that KMC has applied **an** incorrect factor or rate. Letter from Jerry Hendrix, Assistant Vice President, BellSouth, to Riley M. Murphy, Senior Vice President – Legal Affairs, KMC (filed Nov. 7, 2002) (BellSouth Nov. 7 Letter).

<sup>557</sup> BellSouth Ruscilli/Cox Reply Aff. at para. 34.

<sup>558</sup> BellSouth Reply at 45.

<sup>559</sup> **Id** at **46**.

provisions of the interconnection agreement. With regard to transit traffic, the Commission has not had occasion to determine whether incumbent LECs have a duty to provide transit service under section 251(c)(2), and we find no clear Commission precedent or rules declaring such a **duty**.<sup>560</sup> With regard to the third-party originated traffic, BellSouth states that it has requested more information to determine whether KMC has already received **compensation**.<sup>561</sup> We have not previously stated that an incumbent LEC forfeits any contractual right to dispute charges assessed by other carriers simply because it has applied for section 271 authority in a particular state. Indeed, in the *Verizon New Jersey Order*, we found that Verizon's challenge of certain reciprocal compensation bills **from** a competitive LEC did not preclude a finding of checklist **compliance**.<sup>562</sup> We note that KMC does not challenge BellSouth's assertion that two **types** of traffic form the basis of this **dispute**.<sup>563</sup> Nor does KMC contend that BellSouth has improperly invoked the dispute resolution provisions of the interconnection agreement. For these reasons, we cannot conclude that either state commission committed clear error when it found that BellSouth provides interconnection and reciprocal compensation in compliance with checklist items 1 and 13.<sup>564</sup>

156. Second, despite KMC's protestations, this dispute is indeed about compliance with an interconnection agreement.<sup>565</sup> BellSouth states that the interconnection agreement specifies the routing of specific types of traffic and which types of traffic are subject to reciprocal

<sup>560</sup> See *BellSouth Multistate Order*, 17 FCC Rcd at 17719, para. 222 n.849.

<sup>561</sup> BellSouth Ruscilli/Cox Reply Aff. at para. 31.

<sup>562</sup> *Verizon New Jersey Order*, 17 FCC Rcd at 12354, para. 159.

<sup>563</sup> See BellSouth Ruscilli/Cox Reply Aff. at paras. 31-32. KMC argues instead that, because transit traffic represents only 4% of traffic traversing the relevant interconnection trunk group, BellSouth lacks a reasonably basis to withhold 38% of reciprocal compensation owed to KMC. See *KMC Reply*, Attach. A (Letter from Riley M. Murphy, Senior Vice President for Legal Affairs, KMC, to Jerry Hendrix, Assistant Vice President, BellSouth (Oct. 31, 2002) (KMC *Oct. 31* Letter)).

<sup>564</sup> KMC also argues that BellSouth has no factual basis to withhold the bulk of the monies at issue. According to KMC's interpretation of an April 2002 BellSouth document, BellSouth itself acknowledges that the companies' dispute is limited to 4% of the traffic that traverses a certain interconnection trunk group. See KMC *Oct. 31* Letter at 1 ("BellSouth's own data **shows** that BellSouth has no basis for disputing . . . 96% of the total minutes of use billed by KMC during this period."). This document, KMC contends, belies BellSouth's contention that 38% of the traffic is in dispute. See *KMC Reply* at 2. KMC argues that BellSouth should immediately recompense KMC for the remaining 34% of traffic that is not in dispute. BellSouth challenges KMC's interpretation of BellSouth's traffic figures, stating, among other things, that **KMC has** applied an incorrect rate or factor to the usage data and that, in any event, the table shows only seven month's usage data and is therefore not representative of the amount in dispute since June 2000. See BellSouth Nov. 7 Letter. Resolving this dispute requires an interpretation of the language of the interconnection agreement in connection with the routing of and compensation for interconnection traffic. It is difficult to address the many unresolved factual questions presented in such a dispute in the 90-day period of this proceeding. These are matters for the state commissions to decide in the first instance.

<sup>565</sup> We also reject Ms. Arvanitas' allegations concerning reciprocal compensation because they concern disagreements about the terms of and performance under interconnection agreements. See Arvanitas Reply at 11-13.

compensation.<sup>566</sup> KMC asserts that BellSouth has not routed traffic according to the terms of the interconnection agreement.” A state commission would normally be the first arbiter of such disputes, and we do not ordinarily interfere in such matters. Indeed, while KMC states that “this matter *is* not *an* interpretive dispute,” KMC concedes that the dispute concerns BellSouth’s “simple failure to comply with BellSouth’s contractual obligations.”” Whether one carrier is routing traffic pursuant to the terms of an interconnection agreement is a matter for a state commission to decide, and this Commission will not normally preempt *a* state commission’s decisionmaking process.<sup>569</sup>

157. Accordingly, we reject KMC’s allegations of error and *find* that BellSouth complies with checklist item 13.

#### D. Remaining Checklist Items (1, 3, 5, 6, 7, 8, 9, 10, 12, and 14)

158. In addition to showing that it is in compliance with the requirements discussed above, *an* applicant under section 271 must demonstrate that it complies with checklist item 1 (interconnection),<sup>570</sup> checklist item 3 (access to poles, ducts, and conduits):” item 5 (unbundled

<sup>566</sup> BellSouth Ruscilli/Cox Reply *Aff.* at para. 32.

<sup>567</sup> KMC Reply at 3-4. See also KMC Oct. 31 Letter at 2 (“BellSouth’s apparently deliberate misrouting of this traffic for more than eighteen (18) months is a clear violation of the Agreement.”).

<sup>568</sup> KMC Comments at 6.

<sup>569</sup> See *BellSouth Multistate Order*, 17 FCC Red at 17718, para. 220 n.843, 17723, para. 230 (allegations that a carrier refuses to perform according to the terms of an interconnection agreement should be addressed by the state commissions in the first instance). Accord *Verizon Pennsylvania Order*, 16 FCC Red at 17484, para. 118; *Verizon New Jersey Order*, 17 FCC Red at 12354, para. 159. KMC attempts to distinguish these orders on the basis of alleged factual differences, see KMC Reply at 5-7, but we find that any such differences, if they exist, are not legally significant.

<sup>570</sup> 47 U.S.C. § 271(c)(2)(B)(i). We note that Supra claims that BellSouth terminated its access to LENS and, as a result, Supra is unable to provision service to new customers. Supra Comments at 4. BellSouth acknowledges that it terminated Supra’s access to LENS but contends that it did so “to enforce the terms of the parties’ arbitrated and approved interconnection agreement regarding disconnection of service for non-payment.” BellSouth Ruscilli/Cox Reply *Aff.* at para. 8. As the Commission previously found, these claims are not indicative of BellSouth’s ability to provide interconnection. *BellSouth MultiState Order*, 17 FCC Red at 17717, para. 218. Rather, these claims involve fact-specific disputes between Supra and BellSouth and are being handled by the Florida Commission. BellSouth Ruscilli/Cox Reply *Aff.* at para. 8. We note that in October 2002, Supra filed for Chapter 11 bankruptcy protection in Florida. Letter from Glenn T. Reynolds, Vice President – Federal Regulatory, BellSouth, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 02-307 at 1 (filed Oct. 28, 2002). On November 22, 2002, the United States Bankruptcy Court for the Southern District of Florida directed BellSouth to restore Supra’s access to LENS by noon on Tuesday, November 26, 2002. Letter from Kathleen B. Levitz, Vice President – Federal Regulatory, BellSouth, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 02-307 at 1 (filed Nov. 26, 2002). BellSouth complied with the Court’s directive. *Id.* See also Arvanitas Reply. Ms. Arvanitas also argues that the ability of BellSouth to define local calling areas “impede[s] the competition of the [competitive LECs] by lack of joint agreement for portability and reciprocal compensation.” Arvanitas Reply at 10. As we noted in the *BellSouth Multistate Order*, however, “state commissions have the authority to define the local calling area as they see fit.” *BellSouth Multistate Order*, 17 FCC Red at 17723, para. 230 n.881 (citing *Local Competition Order*, 12 FCC Red at 16013, para. 1035).

transport),” item 6 (unbundled local switching),” item 7 (911/E911 access and directory assistance/operator **services**),<sup>574</sup> item 8 (white pages directory listings),” item 9 (numbering administration),” item 10 (databases and associated signaling),” item 12 (local dialing parity),<sup>578</sup> and item **14 (resale)**.<sup>579</sup> Based on the evidence in the record, we conclude, **as** did the state **commissions**,<sup>580</sup> that BellSouth demonstrates that it is in compliance with these checklist **items**.<sup>581</sup> No parties objected to BellSouth’s compliance with these checklist items.

## VI. SECTION 272 COMPLIANCE

159. Section 271(d)(3)(B) provides that the Commission shall not approve a BOC’s application to provide interLATA services unless the BOC demonstrates that the “requested authorization will be carried out in accordance with the requirements of section 272.”<sup>582</sup> Based on the record, we conclude that BellSouth has demonstrated that it will comply with the requirements of section 272.<sup>583</sup> BellSouth provides evidence that it maintains the same structural separation and nondiscrimination safeguards in Florida and Tennessee **as** it does in Alabama,

(Continued from previous page)

<sup>571</sup> 47 U.S.C. § 271(c)(2)(B)(iii).

<sup>572</sup> 47 U.S.C. § 271(c)(2)(B)(v).

<sup>573</sup> 47 U.S.C. § 271(c)(2)(B)(vi).

<sup>574</sup> 47 U.S.C. § 271(c)(2)(B)(vii).

<sup>575</sup> 47 U.S.C. § 271(c)(2)(B)(viii).

<sup>576</sup> 47 U.S.C. § 271(c)(2)(B)(ix).

<sup>577</sup> 47 U.S.C. § 271(c)(2)(B)(x).

<sup>578</sup> 47 U.S.C. § 271(c)(2)(B)(xii).

<sup>579</sup> 47 U.S.C. § 271(c)(2)(B)(xiv). For a discussion of BellSouth’s resale performance, *see supra* Part IV.B.2.

<sup>580</sup> Florida Commission Comments – Hearing at 34-77 (checklist item 1), 100-03 (checklist item 3), 124-28 (checklist item 5), 128-36 (checklist item 6), 136-45 (checklist item 7), 145-49 (checklist item 8), 149-54 (checklist item 9) (noting that “the specific obligations of Section 271(c)(2)(B)(ix) is, in effect, met by default or rendered moot”), 154-58 (checklist item 10), 179-83 (checklist item 12), 187-208 (checklist item 14); Tennessee Authority Comments *at* 26 (checklist item 1), 33 (checklist item 3), 34-35 (checklist item 5), 35-36 (checklist item 6), 36-37 (checklist item 7), 37 (checklist item 8), 38 (Checklist item 9), 38-39 (checklist item 10), 39-40 (checklist item 12), 42-43 (checklist item 14).

<sup>581</sup> See BellSouth Application at 16-24 (checklist item 1), 82-83 (checklist item 3), 99-101 (checklist item 5), 101-02 (checklist item 6), 102-04 (checklist item 7), 104-05 (checklist item 8), 105-06 (checklist item 9), 106-07 (checklist item 10), 109-10 (checklist item 12), 111-13 (checklist item 14).

<sup>582</sup> 47 U.S.C. § 271(d)(3)(B).

<sup>583</sup> See BellSouth Application at 119-20 and App. A, Tab B, Affidavit of Pavan Bhalla at paras. 6-16; BellSouth Ruscilli/Cox Aff. at paras. 149-259.

Georgia, Kentucky, Louisiana, North Carolina, South Carolina, and Mississippi, states in which BellSouth has already received section 271 authority?”

160. We reject AT&T’s argument that BellSouth has violated section 272 through its interstate and intrastate switched access (SWA) tariffs.<sup>585</sup> Section 272 prohibits a BOC ~~from~~ discriminating in favor of its section 272 long distance affiliate and requires that a BOC charge itself or its affiliate ~~no~~ less than the amount charged to any unaffiliated interexchange carrier (IXC) for access to its telephone exchange service.<sup>586</sup> A BOC “must make volume and term discounts available on a non-discriminatory basis to all unaffiliated [IXCs].”<sup>587</sup> Growth discounts violate this mandate because they offer reduced prices based on growth in interexchange traffic, and they therefore create “an artificial advantage for BOC long distance affiliates with no subscribers, relative to existing IXCs and other new entrants.””

161. AT&T contends that BellSouth’s FCC ~~Tariff~~ No. 1 (FCC SWA Tariff)<sup>589</sup> and its intrastate switched access ~~tariff~~ in Florida<sup>590</sup> contain discriminatory discounts that favor BellSouth’s long-distance affiliate, BellSouth Long Distance, by offering reduced prices based on growth in the volume of switched access service ~~purchased~~.<sup>591</sup>

162. BellSouth contends that there is no section 272 violation because BellSouth Long Distance is not eligible to take service under the ~~tariffs~~ at issue.<sup>592</sup> We agree. The federal tariff contains language expressly limiting its availability to customers that meet certain minimum

<sup>584</sup>

See BellSouth Ruscilli/Cox Aff. at paras. 149-253; *BellSouth Georgia/Louisiana Order*, 17 FCC Red at 9177, para. 279; *BellSouth Multistate Order*, 17 FCC Red at 17748, para. 271.

<sup>585</sup> AT&T Comments at 26-37. We note that the Commission rejected this identical argument by AT&T in the *BellSouth Multistate Order*. See *BellSouth Multistate Order*, 17 FCC Red at 17748-50, paras. 271-74.

<sup>586</sup>

47 U.S.C. § 272(c)(1), (e)(3).

<sup>587</sup>

*Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended*, CC Docket No. 96-149, First Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Red 21905, 22028-29, para. 257 (1996).

<sup>588</sup>

*Access Charge Reform*, CC Docket No. 96-262, Fifth Report and Order and Further Notice of Proposed Rulemaking, 14 FCC Red 14221, 14294, para. 134 (1999).

<sup>589</sup>

BellSouth Telecommunications, Inc. (BSTI), Transmittal No. 637, F.C.C. Tariff No. 1, Section 26, SWA Contract Tariff No. 2002-01 (effective May 18, 2002).

<sup>590</sup>

See Letter from Jodi S. Sirotnak, Regulatory Analyst, Federal Government Affairs, AT&T, to Marlene H. Dortch, Secretary, Federal Communications Commission, CC Docket No. 02-307 (filed Oct. 23, 2002) (attaching BellSouth Florida SWA Contract Tariff FL2002-01 at E.26. (effective June 17, 2002)). BellSouth withdrew a similar SWA contract tariff for Tennessee on August 12, 2002. BellSouth Ruscilli/Cox Reply Aff. at para. 69.

<sup>591</sup>

AT&T Comments at 26-37.

<sup>592</sup>

BellSouth Reply at 47; BellSouth Ruscilli/Cox Reply Aff. at paras. 64, 70, and 74.

usage requirements associated with switched access **service**.<sup>593</sup> It also requires that customers subscribe to the tariff within 30 days of its effective date.” The Florida contract tariff contains similar limiting **language**.<sup>595</sup> BellSouth Long Distance did not meet these minimum usage requirements and did not subscribe within 30 days of the tariffs’ effective dates.<sup>596</sup> BellSouth Long Distance is therefore ineligible for these tariffs. Because we find that BellSouth Long Distance is not eligible for service under these tariffs, we need not reach the question of whether the tariffs offer illegal growth discounts.

**163.** AT&T also contends that there is a section **272** violation because ‘there is no impediment’ to BellSouth ‘entering into the same arrangement’ with BellSouth Long Distance sometime in the **future**.<sup>597</sup> AT&T argues that, under the Commission’s pricing flexibility rules, BellSouth could potentially file a certification allowing BellSouth to enter into the same contract with BellSouth Long Distance and that such a contract would contain lower minimum usage requirements.<sup>598</sup> We reject AT&T’s contention that we should find a violation based on a hypothetical future contract with BellSouth Long Distance. Accordingly, we find that these BellSouth tariff offerings do not result in a section **272** violation.<sup>599</sup> We note, however, that if BellSouth Long Distance were eligible to obtain service under these or similar tariffs, we could then address allegations that such tariffs offer illegal growth discounts in violation of section **272**.

## VII. PUBLIC INTEREST

**164.** Apart from determining whether a BOC satisfies the competitive checklist and will comply with section **272**, Congress directed the Commission to assess whether the requested authorization would be consistent with the public interest, convenience, and **necessity**.<sup>600</sup> At the

<sup>593</sup> FCC SWA Tariff ~~at~~ **26.1.5(B)** (reflecting a minimum usage requirement of 3,385,697,632 minutes in year one and increasing in subsequent years).

<sup>594</sup> FCC SWA Tariff at Introduction (“[i]n order to take advantage of the volume and term discount plan in BellSouth SWA Contract Tariff **No. 2002-01**, customers must subscribe to the **tariff** within 30 days of the tariffs effective date.”).

<sup>595</sup> See BellSouth Florida SWA Contract Tariff FL 2002-01 at E.26.1.5.B. (reflecting a minimum usage requirement of 1,054,830,619 minutes in year one and increasing in subsequent years). See also *id.* at **E26.1.1.D** (“A customer that is similarly situated may subscribe within a period of thirty (30) days following the effective date of the BellSouth SWA Contract Tariff **No. FL2002-01**.”).

<sup>596</sup> See BellSouth Ruscilli/Cox Reply Aff. at paras. 70, 74.

<sup>597</sup> AT&T Comments at 37.

<sup>598</sup> *Id.* See also 47 C.F.R. § **69.727(a)(2)(iii)**.

<sup>599</sup> Although our review in this instance is limited solely to section 271 compliance, AT&T’s allegations, if true, may be addressed **through** other avenues. For example, AT&T may pursue an action pursuant to sections 201, 202, or 208 of the Act, see 47 U.S.C. §§ 201, 202, 208, or **through** appropriate state proceedings.

<sup>600</sup> 47 U.S.C. § **271(d)(3)(C)**.

same time, section 271(d)(4) of the Act states in full that “[t]he Commission may not, by rule or otherwise, limit or extend the terms used in the competitive checklist set forth in subsection (c)(2)(B).”<sup>601</sup> Accordingly, although the Commission must make a separate determination that approval of a section 271 application is “consistent with the public interest, convenience, and necessity,” it may neither limit nor extend the terms of the competitive checklist of section 271(c)(2)(B). The Commission views the public interest requirement as an opportunity to review the circumstances presented by the application to ensure that no other relevant factors exist that would frustrate the congressional intent that markets be open, as required by the competitive checklist, and that entry will serve the public interest as Congress expected.

165. We conclude that approval of this application is consistent with the public interest. From our extensive review of the competitive checklist, which embodies the critical elements of market entry under the Act, we find that barriers to competitive entry in the local exchange markets have been removed and the local exchange markets in each state today are open to competition. We further find that the record confirms our view, as noted in prior section 271 orders, that BOC entry into the long distance market will benefit consumers and competition if the relevant local exchange market is open to competition consistent with the competitive checklist.<sup>602</sup>

166. We disagree with Sprint that we must, under our public interest standard, consider a variety of other factors as evidence that the local market is not yet truly open to competition, despite checklist compliance.<sup>603</sup> Sprint also argues that low levels of entry in the application states indicate that the application is not in the public interest.<sup>604</sup> We note that Congress specifically declined to adopt a market share or other similar test for BOC entry into long distance. @’ Given an affirmative showing that the competitive checklist has been satisfied, low customer volumes or the failure of any number of companies to enter the market in and of themselves do not necessarily undermine that showing. As the Commission has stated in previous section 271 orders, factors beyond the control of the BOC, such as individual competitive LEC entry strategies, can explain low levels of residential competition.<sup>605</sup>

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<sup>601</sup> 47 U.S.C. § 271(d)(4).

<sup>602</sup> See *SWBT Texas Order*, 15 FCC Rcd at 18558-89, para. 419.

<sup>603</sup> Those factors include the level of competitive LEC market share, the weakening economy, the financial strength of competitive LECs, and the failure of other BOCs to enter the market in the two application states. See *Sprint Comments* at 4-12.

<sup>604</sup> *sprint Comments* at 10.

<sup>605</sup> See, e.g., *Ameritech Michigan Order*, 12 FCC Rcd at 20585, para. 77; *Sprint v. FCC*, 274 F.3d at 553-54.

<sup>606</sup> See, e.g., *Verizon Pennsylvania Order*, 16 FCC Rcd 17487, para. 126.

## A. Assurance of Future Compliance

167. As set forth below, we find that the existing Service Performance Measurements and Enforcement Mechanisms (SEEM) plans currently in place for Florida and Tennessee provide assurance that these local markets will remain open after BellSouth receives section 271 authorization.<sup>607</sup> The Florida Commission's and the Tennessee Authority's oversight and review of their respective plans and their performance metrics provide additional assurance that the local market will remain open.<sup>608</sup> In prior orders, the Commission **has** explained that one factor it may consider **as** part of its public interest analysis is whether a BOC would have adequate incentives to continue **to** satisfy the requirements of section 271 after entering the long distance market. Although it is not a requirement for section 271 authority that a BOC be subject to such performance assurance mechanisms, the Commission previously has found that the existence of **a** satisfactory performance monitoring and enforcement mechanism is probative evidence that the BOC will continue to meet its section 271 obligations after a grant of such **authority**.<sup>609</sup>

168. We conclude that the Florida and Tennessee SEEM plans provide sufficient incentives to foster post-entry checklist compliance. These plans were developed in open proceedings with participation by all sectors of the industry and all parties in the instant proceeding had the opportunity to raise their concerns to the Florida Commission and Tennessee Authority.<sup>610</sup> We note that the Florida and Tennessee plans, which are identical, are similar to the Georgia SEEM plan already reviewed and approved by **this** Commission.<sup>611</sup> No party commented on these differences.

<sup>607</sup> *Ameritech Michigan Order*, 12 FCC Red at 20748-50, paras. 393-98. We note that in all of the previous applications that we have granted to date, the applicant **was** subject to an enforcement plan administered by the relevant state commission to protect against backsliding after BOC entry into the long-distance market. See BellSouth Application App. E – Florida, Vol. 10, Tab 48, *Notice of Proposed Agency Action Order Implementing Change Request Metrics and Revising Due Date for Tier 1 and Tier 2 Payments (Florida SEEM Adoption Order)*; BellSouth Application App. H – Tennessee, Vol. 3, Tab 54, *Order Approving Settlement Agreement at 4 (Tennessee Settlement Agreement Order)*. In **Tennessee**, the parties agreed to use the Georgia SEEM until BellSouth implemented the Florida SEEM on December 1, 2002. BellSouth Dec. 3 *Ex Parte Letter* – #1.

<sup>608</sup> BellSouth Application App. E – Florida, Vol. 7, Tab 22, *Final Order Requiring Performance Assessment Plan at 137 (Florida Performance Measures Order)*. Through December 31, 2003, any changes to the Florida SEEM **are** automatically made to the Tennessee SEEM. After 2003, the Tennessee Authority may review the plan and change it. *Tennessee Settlement Agreement Order* at 4.

<sup>609</sup> See *Second BellSouth Louisiana Order*, 13 FCC Red at 20806, paras. 363-64.

<sup>610</sup> See BellSouth Vamer Aff. at para. 186; see also *Florida SEEM Adoption Order* at 7. In Tennessee, BellSouth reached an agreement with many competitive LECs to use the Florida SEEM. All competitive LECs that chose to participate in the **Tennessee** Authority's performance measurements proceeding were given the opportunity to conduct discovery, submit testimony and otherwise participate in the proceeding and to comment on **SQM** and SEEM proposals. BellSouth Vamer Reply Aff. at para. 98.

<sup>611</sup> BellSouth Application at 118; see also BellSouth Vamer Aff. at paras. 170-76. The primary differences between the Florida and Tennessee SEEM plans and the Georgia plan are that these plans have two tiers rather than three, the remedy calculations apply on a per-measure basis rather than a per transaction basis, and the financial liability is capped at 39% rather than 44%. See BellSouth Vamer Aff. at paras. 158-76.



169. As in prior section 271 orders, our conclusions are based on a review of several key elements in any performance assurance plan: total liability at risk in the plan; performance measurement and standards definitions; structure of the plan; self-executing nature of remedies in the plan; data validation and audit procedures in the plan; and accounting requirements.<sup>612</sup>

170. We have not mandated any particular penalty structure, and we recognize different structures can be equally effective.” We also recognize that the development and implementation of performance measures and appropriate remedies is an evolutionary process that requires changes to both measures and remedies over time. The Florida plan structure was developed with input from the Florida Commission’s staff, BellSouth, and the competitive LECs.<sup>614</sup> We believe that competitive LECs had sufficient opportunity to raise any issues in the Florida proceeding, and that the issues were appropriately handled by the workshops and the Florida Commission. In Tennessee, the Florida SEEM plan was adopted by a settlement agreement between BellSouth and competitive LECs operating in Tennessee.” In addition, we note that both the Florida Commission and the Tennessee Authority have the ability to modify BellSouth’s SEEMs.<sup>616</sup> We anticipate that the parties will continue to build on their own work and the work of other states to ensure that such measures and remedies to accurately reflect actual commercial performance in the local marketplace.

171. We do not agree with Mpower that we should seek supplemental competitive safeguards.<sup>617</sup> The Florida Commission and Tennessee Authority will continue to subject BellSouth’s performance metrics to rigorous scrutiny in their on-going proceedings and audits in Florida and Tennessee; thus, it is not unreasonable for us to expect that the penalty structure

<sup>612</sup> The cap on BellSouth’s financial liability is 39%. The SEEM plans are self-executing, have two tiers and provide for an annual audit. BellSouth Vamer Aff. at para. 171 and Ex. PM-20; see e.g., *Verizon Massachusetts Order*, 16 FCC Rcd at 9121-25, paras. 240-47; *SWBT Kansas/Oklahoma Order*, 16 FCC Rcd at 6377-81, paras. 273-78.

<sup>613</sup> *SWBT Texas Order*, 15 FCC Rcd at 18561, para. 423; *Bell Atlantic New York Order*, 15 FCC Rcd at 4166-67, para. 433. The Commission has previously found that the enforcement mechanisms developed in different plans by New York and Texas would be effective in practice. See, e.g., *Bell Atlantic New York Order*, 15 FCC Rcd at 4166-67, para. 433. We reached this conclusion based on these plans’ having five important characteristics: potential liability that provides a meaningful and significant incentive to comply with the designated performance standards; clearly-articulated, predetermined measures and standards, which encompass a comprehensive range of carrier-to-carrier performance; a reasonable structure that is designed to detect and sanction poor performance when it occurs; a self-executing mechanism that does not leave the door open unreasonably to litigation and appeal; and reasonable assurances that the reported data are accurate. *Id.*; see also *SWBT Texas Order*, 15 FCC Rcd at 18558-59, para. 423.

<sup>614</sup> BellSouth Vamer Aff. at para. 186.

<sup>615</sup> *Tennessee Settlement Agreement Order* at 4.

<sup>616</sup> As part of the six-month review, the Florida Commission has also received proposals from BellSouth and the competitive LECs to change the Florida SEEM. BellSouth Vamer Aff. at para. 186; see also *supra* n.608.

<sup>617</sup> Mpower comments at 18-20. We similarly declined to require additional reporting measures in Georgia and Louisiana. *BellSouth Georgia/Louisiana Order*, 17 FCC Rcd at 9183, para. 300.

could be modified if BellSouth's performance is deficient post approval.<sup>618</sup> We also stand ready to exercise our various statutory enforcement powers under section 271(d)(6) quickly and decisively to ensure that the local market remains open in Florida and Tennessee.

## B. Allegations of Inappropriate Marketing

172. We reject Supra's allegation that BellSouth violates Customer Proprietary Network Information (CPNI) requirements.<sup>619</sup> Specifically, Supra alleges that BellSouth uses its OSS to monitor competitive LEC completed orders.<sup>620</sup> BellSouth states, however, that it treats CPNI and Customer Proprietary Information (CPI) in a manner consistent with the requirements of the Commission's rules, Section 222 of the Act, and any applicable state or local requirements.<sup>621</sup> We find that Supra does not provide sufficient evidence to demonstrate a section 222(b) violation.<sup>622</sup>

## C. Other Issues

173. **Premature Long Distance Service.** BellSouth disclosed an instance of premature long distance service provisioning by BSLD in Florida and Tennessee.<sup>623</sup> According to BellSouth, from approximately October 1, 2002 to October 9, 2002, twenty-five customers selected BSLD as their interLATA provider. Twenty-two of these customers were in Tennessee,

<sup>618</sup> *Florida Performance Measures Order* at 17. *See supra* n.608

<sup>619</sup> *supra* comments at 21.

<sup>620</sup> *Id*

<sup>621</sup> BellSouth Ruscilli/Cox Reply Aff. at para 60. *See Implementation of the Telecommunications Act of 1996, Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information, Implementation of the Non-Accounting Safeguards of Section 271 and 272 of the Communications Act of 1934, as amended*, CC Docket Nos. 96-115 and 96-149, Order on Reconsideration and Petitions for Forbearance, 14 FCC Rcd 14409, 14414, par. 7, 14443, para. 65, 14449, para. 77 (1999). *See also Implementation of the Telecommunications Act of 1996, Telecommunications Carriers' Use of Customer Proprietary Network Information, Implementation of the Non-Accounting Safeguards of Section 271 and 272 of the Communications Act of 1934, as amended, 2000 Biennial Review – Review of Policies and Rules Concerning Unauthorized Changes of Consumer's Long Distance Carriers*, CC Docket Nos. 96-115, 96-149, 00-257, Third Report and Order and **Third** Further Notice of Proposed Rulemaking, FCC 02-214 (rel. July 25, 2002) (*CPNI Third Report and Order*).

<sup>622</sup> We take comfort in the fact that BellSouth has adopted a region-wide policy that it will not engage in any winback activities based on CPNI information for ten calendar days from the date that service has been provided to a customer by a competitive LEC. Florida Commission Comments – Hearing at 16 n.1; Tennessee Comments at 45; BellSouth Ruscilli/Cox Aff. at para. 69. Letter from Kathleen B. Levitz, Vice President – Federal Regulatory, BellSouth, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 02-307 at 1 (filed Nov. 15, 2002) (BellSouth Nov. 15 *Ex Parte* Letter – #1 ).

<sup>623</sup> BellSouth Oct. 29 *Ex Parte* Letter – #2; *see also* Letter from Kathleen B. Levitz, Vice President – Federal Regulatory, BellSouth, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 02-307 (filed Oct. 30, 2002) (BellSouth Oct. 30 *Ex Parte* Letter – #2).

two customers were in Florida and one customer was in Alabama.” BellSouth states that it had specific software edits in place for the express purpose of preventing orders for BSLD service from being completed in pre-relief states, but starting October 1, 2002, those edits were unintentionally rendered ineffective by subsequent *software* updates that were implemented to solve other ordering problems.<sup>625</sup>

174. In response to BellSouth’s disclosure, AT&T requested that the Commission deny the instant application on two grounds. First, AT&T claims that this incident demonstrates that BellSouth does not adequately test its *software*.<sup>626</sup> Second, AT&T points out that BellSouth had previously marketed long distance before it received section 271 authority and that this Commission warned BellSouth to exercise caution to ensure it did not market long distance services in jurisdictions in which it had not received section 271 authorization. AT&T states that the premature marketing and providing of interLATA services will continue until the Commission sends a message that such conduct will not be tolerated!”

175. Upon learning that customers had obtained long distance service, BellSouth took immediate corrective action, including removing BSLD as the customer’s interLATA long distance provider and ensuring that the customers receive no billing for any usage, and it notified the Commission.<sup>628</sup> BellSouth implemented an emergency release of new software edits, effective on October 9, 2002, to correct the situation, and states that it is monitoring the edits to ensure they function properly. BellSouth also implemented a “desktop priority” message on the service representatives’ monitors emphasizing that BellSouth is not yet authorized to provide interLATA service in Florida and Tennessee and that no sales of BSLD services are permitted to be made in those two states.”

176. We recognize that potential violations of federal telecommunications law could be relevant to the section 271 inquiry.<sup>630</sup> In view of the facts presented here, however, because the

<sup>624</sup> BellSouth Oct. 30 *Ex Parte* Letter – #2 at 1.

<sup>625</sup> According to BellSouth, the updates were designed to allow customers living in post-relief states, such as Georgia, to use BSLD, even *though* those customers were served by switches located *in* a pre-relief state, such as Tennessee. BellSouth Oct. 29 *Ex Parte* Letter – #2 at 2. BellSouth states that most of the errors were corrected by Oct. 9, when BellSouth implemented an emergency release of its software edits. BellSouth avers that a remaining problem with the edits was corrected on Oct. 18, 2002. BellSouth Oct. 29 *Ex Parte* – #2 at 2.

<sup>626</sup> AT&T Reply at 46. We address AT&T’s software testing claim as part of our discussion of BellSouth’s change management process testing above in Part IV.B.2.g.

<sup>627</sup> AT&T Reply at 47. Neither incident reflects upon the openness of the local exchange market in the states at issue.

<sup>628</sup> BellSouth Oct. 29 *Ex Parte* Letter – #2 at 1.

<sup>629</sup> *Id.* at 2.

<sup>630</sup> See *Application by Veruon New England Inc., Veruon Delaware Inc., Bell Atlantic Communications Inc. (d/b/a Verizon Long Distance), NYNEX Long Disfance Company (d/b/a Verizon Enterprise Solutions), Verizon Global Networks Inc., and Verizon Select Services Inc., for Aufhorizafion To Provide In-Region, InterLATA Services* (continued...)

allegations do not relate to openness of the local telecommunications markets to competition, we reject AT&T's argument that we should deny or delay this application under the public interest standard.<sup>631</sup> Regardless of what enforcement action we may take in the future, BOCs should not provide long distance service in any in-region state prior to receiving section 271 approval from the Commission for that particular state, and they should implement controls to prevent such service from taking place. In response to AT&T's comments, we note that there is no evidence showing that the prior premature marketing incident disclosed to the Commission during the pendency of the BellSouth *Multistate Order*<sup>632</sup> is in any way connected to the BellSouth customers that ordered and were provisioned BSLD service in Florida and Tennessee in **this instance**.<sup>633</sup>

177. *Network Telephone's "Tying" Claims.* Network Telephone claims that BellSouth is improperly "tying" several of its services to basic local exchange service, resulting in an anticompetitive marketplace!" We find these claims to be meritless.<sup>635</sup> First, Network Telephone claims that BSLD refuses to provide service to competitive LEC customers unless the competitive LEC has an operational agreement in place with BSLD.<sup>636</sup> BellSouth states, however, that BSLD is willing to provide service to competitive LECs, and that it remains ready to provide service to Network Telephone's end users subject to Network Telephone's review of and concurrence with BSLD's operating procedures, and its completion of a questionnaire!" As we stated in the *BellSouth Multistate Order*, while we recognize the inconvenience this may have

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in *New Hampshire and Delaware*, WC Docket No. 02-157, Memorandum Opinion and Order, 17 FCC Rcd 18660, 18754-75, para. 168; see also *Verizon New Jersey Order*, 17 FCC Rcd at 12368, para. 190.

<sup>631</sup> See *BellSouth Multistate Order*, 17 FCC Rcd at 17763-65, paras. 299-301; see also *Verizon New Jersey Order*, 17 FCC Rcd at 12368, para. 190.

<sup>632</sup> During the pendency of BellSouth's multistate application, BellSouth disclosed that it sent a buckslip describing long distance service offerings by BSLD to 130,000 customers in the five states plus Florida and Tennessee, but had not provided long distance service to any of them. *BellSouth Multistate Order*, 17 FCC Rcd at 17763-65, para. 299-301.

<sup>633</sup> Letter from Kathleen B. Levitz, Vice President – Federal Regulatory, BellSouth, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 02-307 at 2 (filed Nov. 14, 2002) (BellSouth Nov. 14 *Ex Parte* Letter – #2).

<sup>634</sup> Network Telephone Comments at 7.

<sup>635</sup> A tying arrangement is a specific term of **art** and exists when a vendor or seller agrees **to** sell one product, the "tying" product, only **on** the condition that the vendee or purchaser also purchases another product, the "tied product." *Black's Law Dictionary* 790 (5<sup>th</sup> ed. 1983). Network Telephone has provided **no** evidence to support its very general "tying" allegations.

<sup>636</sup> Network Telephone Comments at 3-6.

<sup>637</sup> When competitive LECs first contacted BSLD about providing long distance to competitive LEC end users, BSLD requested that competitive LECs complete a questionnaire modeled **after** the ones used by other LECs. See BellSouth Reply at 48. On October 9, 2002, BSLD asked Network Telephone to complete a simplified version of this questionnaire. **Id**

caused competitive LECs, absent further evidence on the record, we do not find that BellSouth's policy violates the public interest standard of section 271.<sup>638</sup>

**178.** Next, Network Telephone claims that BellSouth is "tying" its DSL-based high-speed Internet access service to BellSouth local exchange service.<sup>639</sup> As BellSouth points out, the Commission has repeatedly reviewed this same BellSouth policy and determined that it is not a bar to section 271 compliance.<sup>640</sup> Notably, Network Telephone did not present any new arguments in support of its general allegation. BellSouth is correct that we have previously rejected this argument, and nothing in the record would cause us to reach a different determination here.<sup>641</sup>

**179.** Network Telephone also claims that BellSouth uses its relationship with its advertising company, BellSouth Advertising and Publishing Company (BAPCO), in a "tying" arrangement. Network Telephone claims that BellSouth improperly uses BAPCO as its sales agent to sell its Simple Solutions Promotion.<sup>642</sup> BellSouth states, however, that this test program has not been implemented in Florida or Tennessee and Network Telephone does not dispute this.<sup>643</sup> Accordingly, the alleged anticompetitiveness of BellSouth's practice is not relevant to our analysis of the current application.<sup>644</sup>

**180.** Similarly, Network Telephone also briefly states that BellSouth's Select Points program awards points that *can* be converted into cash and applied to current bills, for dollars spent with BAPCO.<sup>645</sup> BellSouth states that the points earned can be redeemed in a total of three ways, only one of which allows customers to apply points redeemed for cash towards a current

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<sup>638</sup> See *BellSouth Multistate Order*, 17 FCC Rcd at 17762-63, para. 298. If evidence becomes available to the Commission in the future sufficient to show that BellSouth's actions are in violation of the Act or a Commission Rule, we will pursue appropriate enforcement action.

<sup>639</sup> Network Telephone Comments at 7.

<sup>640</sup> BellSouth Reply at 49.

<sup>641</sup> See *BellSouth Multistate Order*, 17 FCC Rcd at 17683, para. 164; see also *BellSouth Georgia/Louisiana Order*, 17 FCC Rcd at 9100-02, paras. 157-58.

<sup>642</sup> Network Telephone Comments at 7.

<sup>643</sup> BellSouth Ruscilli/Cox Reply Aff. at para. 52.

<sup>644</sup> Network Telephone also claims that it has experienced problems with ~~Cingular~~ Wireless not loading Network Telephone's NXXs into its system, preventing Network Telephone's customers from receiving calls from Cingular Wireless customers. See Network Telephone Comments at 7. We agree with BellSouth that Cingular Wireless is a separate legal entity jointly owned by BellSouth and SBC Communications, Inc., that Cingular Wireless has a separate management structure, and that BellSouth does not exercise control over ~~Cingular~~ Wireless's policies or its network management. In addition, BellSouth correctly states that because Cingular Wireless is not a party to this proceeding and the provision of wireless service is not an issue related to BellSouth's compliance with sections 271 and 272, this issue should not be addressed in this proceeding. See BellSouth Ruscilli/Cox Reply Aff. at para. 53.

<sup>645</sup> Network Telephone Comments at 7.

bill.<sup>646</sup> BellSouth states that the program is tariffed in six states, including Tennessee. In Florida, BellSouth provides an untariffed version of **this** program. Though similar to the tariffed version, the untariffed version of **this** program differs in three **ways**.<sup>647</sup> We find that **this** issue is not related to BellSouth's compliance with sections 271 and 272, and thus, is outside the scope of a section 271 proceeding. The issue is **more** appropriately handled at the state level. In fact, the state commissions in BellSouth's region have shown their willingness to deal with the issue."

## VIII. SECTION 271(d)(6) ENFORCEMENT AUTHORITY

181. Section 271(d)(6) of the Act requires BellSouth to continue to satisfy the "conditions required for. . . approval" of its section 271 application after the Commission approves its application.<sup>649</sup> **Thus**, the Commission has a responsibility not only to ensure that BellSouth is in compliance with section 271 today, but also that it remains in Compliance in the future. As the Commission **has** already described the post-approval enforcement framework and its section 271(d)(6) enforcement powers in detail in prior orders, it is unnecessary to do **so** again here.<sup>650</sup>

182. Working with each of the state commissions, we intend to closely monitor BellSouth's post-approval compliance to ensure that BellSouth does not "cease[] to meet any of the conditions required for [section 271] approval." We stand ready to exercise our various statutory enforcement powers quickly and decisively in appropriate circumstances to ensure that the local market remains open in each of the states.

183. Consistent with prior section 271 orders, we require BellSouth to report to the Commission all Florida and Tennessee Monthly State Summary (MSS) reports and the MSS Charts, beginning with the first full month after the effective date of this Order, and for each

<sup>646</sup> BellSouth **states** that the **points** can be redeemed in three ways: 1) the customer receives a BellSouth Select, Inc.-issued check when the customer subscribes to the new unregulated service (**e.g.**, redeem **points** for a check for an amount equal to the charges for the first **two** months of service when subscribing to BellSouth's FastAccess DSL service); 2) the customer can use **points** to **earn** products or service offered by BellSouth Partners (**e.g.**, navel, computer equipment); or 3) the customer can redeem **points** for cash by requesting a check **60m** BellSouth Select, Inc. Letter **from** Kathleen B. Levitz, Vice President – Federal Regulatory, BellSouth, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 02-307 (filed Nov. 8, 2002) (BellSouth Nov. 8 *Ex Parte* Letter – #2)

<sup>647</sup> The untariffed program requires participants to subscribe to a BellSouth unregulated service, **limits** the value of redemption to the cumulative spending of the participant **on** unregulated services, and that all costs incurred by BellSouth by participation in the program are charged against and recorded as unregulated expenses. See BellSouth Nov. 8 *Ex Parte* Letter – #2 at 2.

<sup>648</sup> BellSouth Ruscilli/Cox Reply Aff. at 51.

<sup>649</sup> 47 U.S.C. § 271(d)(6).

<sup>650</sup> See, **e.g.**, *SWBT Texas Order*, 15 FCC Red at 18567-68, **paras.** 434-36.

<sup>651</sup> 47 U.S.C. § 271(d)(6)(A).

month thereafter for one year, unless extended by the Commission. These results and reports will allow us to review BellSouth's performance on an ongoing basis to ensure continued compliance with the statutory requirements. We are confident that cooperative state and federal oversight and enforcement can address any backsliding that may arise with respect to BellSouth's entry into Florida and Tennessee.

## **IX. CONCLUSION**

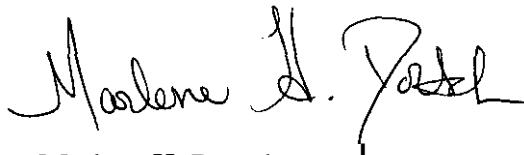
184. For the reasons discussed above, we grant BellSouth's application for authorization under section 271 of the Act to provide in-region, interLATA services in the states of Florida and Tennessee.

## **X. ORDERING CLAUSES**

185. Accordingly, IT IS ORDERED that, pursuant to sections 4(i), 4(j), and 271 of the Communications Act of 1934, ~~as~~ amended, 47 U.S.C. §§ 154(i), 154(j) and **271**, BellSouth's application to provide in-region, interLATA service in the states of Florida and Tennessee, filed on September 20, 2002, IS GRANTED.

186. IT IS FURTHER ORDERED that this Order SHALL BECOME EFFECTIVE December 30, 2002.

FEDERAL COMMUNICATIONS COMMISSION

A handwritten signature in black ink, appearing to read "Marlene H. Dortch", is written over a horizontal line.

Marlene H. Dortch  
Secretary